Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

Petition For A Writ Of Certiorari
To The District Court of Appeal, Second District, State of Florida

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there has been a denial of the fundamental constitutional right to be heard under the Fourteenth Amendment of the United States Constitution as a result of the District Court of Appeal, Second District, State of Florida, denying the Petitioner the right to a trial of well-pled contract claims which have never been decided by a trier of fact and never appealed and therefore have never been decided by the District Court of Appeal, Second District?

2. Whether there has been a denial of the fundamental constitutional right to the access of courts under the Fourteenth Amendment of the United States Constitution as a result of the District Court of Appeal, Second District, State of Florida, denying the Petitioner the right to a trial of well-pled contract claims which have never been decided by a trier of fact and never appealed and therefore have never been decided by the District Court of Appeal, Second District?

LIST OF PARTIES

The parties are: Petitioner, Pinellas County, who was the plaintiff in the state trial court and appellant on review before the state appellate court; CH2M Hill, the engineer, who was the defendant in the state trial court and appellee on review before the state appellate court. Another party named in the caption of the state court proceedings is Madison Management Group, Inc. (hereinafter referred to as "Madison") who was the successor to Clevepak Corporation which was the successor to Interpace Corporation (hereinafter referred to as "Interpace"). On November 8, 1991, Madison filed for protection under Chapter 11 of the Federal Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, Case No. 91 B 23969. Therefore, Madison is not a party to these proceedings.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Pinellas County, respectfully requests that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second District, State of Florida, entered on February 2, 1994, and the Order by the same court denying Petitioner's Motion for Rehearing and Rehearing En Banc entered on March 24, 1994.

OPINIONS BELOW

The February 2, 1994 opinion of the District Court of Appeal, Second District, State of Florida, and the Denial of the Motion for Rehearing and Rehearing En Banc entered on March 24, 1994 are the decisions herein sought to be reviewed which are unreported. The decisions are reprinted in the separate

Appendix to the Petition. (A:A,C) The prior judgment of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, Circuit Civil No. 92-4387-CI-13,and the Order Denying Motion for Rehearing by the same court are also unreported decisions that have been reprinted in the separate Appendix to this Petition and technically should also be reversed. (A:D,F)

JURISDICTION

The District Court of Appeal, Second District, State of Florida, entered its decision on February 2, 1994. (A:A) Thereafter, Petitioner filed a Motion for Rehearing and Rehearing En Banc with the District Court of Appeal, Second District which was denied on March 24, 1994. (A:B,C) Jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves section one of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The original suit was brought by Petitioner, Pinellas County (hereinafter referred to as "Pinellas"), for a defectively

manufactured and engineered 13.5 mile water distribution pipeline. The suit was brought on the legal theories of breach of contract and negligence. This pipeline, which is also commonly referred to as the Transmission Main, is 60-inches in diameter. It is the very heart of the water system of Pinellas. Respondent, CH2M Hill Southeast, Inc., successor to Black, Crow & Eidness, Inc. (hereinafter referred to as "Hill"), was the design engineer with monitoring responsibilities for the Transmission Main. The pipe is described as "prestressed concrete pipe" and was manufactured by Interpace. Later Interpace changed its name to Madison Management Group, Inc., and then merged with Clevepak Corp.

I. Contractual Relationship Between Parties.

In 1975, Pinellas and Hill entered into an Engineering Consulting Agreement in which Hill was to provide in pertinent part for: the preparation of a complete basis for the design of the 60-inch diameter Transmission Main; consultation and advice as to the laboratory testing and inspection of samples or materials; preparation and furnishing of all necessary contracts, specifications, schedules of quantities and estimates of costs; the visitation of the pipe manufacturing construction site on an average basis of four (4) visits per month in order to protect Pinellas against defects and deficiencies in the work of the manufacturer; the approval of shop drawings; the judging of the manufacturing performance in making prestressed pipe according to specifications; and the recommendation of final acceptance of the pipeline that it had been produced according to the plans and specifications after its completion. (A:H:17-32)

Hill, as engineer, prepared the plans and specifications, bid documents, and contracts for the pipeline in 1976. Since Interpace was the successful bidder, Hill drafted the contract between Interpace and Pinellas. Hill was given the right to inspect the manufacturing process and component materials used in pipe manufacture. Interpace was required to furnish at

its expense to Hill all reasonable facilities, labor and materials deemed necessary by Hill for conducting such inspections. No tests on steel or concrete were ever submitted by Interpace pursuant to Section 1.9 of AWWA C-301-72, which were the standards under which the pipe was to be manufactured. Hill did not require submittal to Hill of tests on the wire or concrete as the overseeing and consulting engineer.

II. History And Performance Of Pipeline.

The pipeline was manufactured and installed between March of 1977 and October of 1978. On October 2, 1978, the pipeline was placed into service. (A:H:5-6) On November 13, 1979, a section of the 60-inch pipe exploded creating a giant hole in the pipeline and threatening destruction of a large condominium. (A:H:6) The burst pipe caused Pinellas to embark upon an extensive investigation to determine the cause for the failure and the condition of the entire line. (A:H:6-7) On November 1, 1983, Pinellas determined that not only were the two pipe failures caused by improper manufacturing, materials and techniques, but that the *entire pipeline* was defective and should be replaced. (A:H:6-7)

The transmission line, which is the subject of this litigation in state court, is so critical to the adequate supply of water to Pinellas that the line cannot be taken out of service except under extreme emergencies and then for only a very short period of time. Hill knew the critical nature of the line and that the pipeline had to be constructed without material defects in the pipe. (A:H:4) The representations made to Pinellas were that the prestressed pipe would last well over one hundred years. Despite these representations, Pinellas experienced its first pipe rupture shortly after the line had been completed. (A:6)

III. Summary Of Well Pled Breach Of Contract Allegations.

On or about October 30, 1983, Pinellas filed the original

action against Hill and Interpace, along with other defendants. The original complaint included multiple breach of contract allegations against Hill. (A:H:16) Consequently, Pinellas filed an amended complaint, based on the additional information obtained from its further investigation of the pipeline. (A:M) Hill filed objections to the filing of the amended complaint and a motion to strike allegations. (A:K,N) The trial court denied the motion and objections filed by Hill. (A:L,O)

The First Amended Complaint alleged the following breaches of contract against Hill:

1. Hill was responsible for duties imposed by the manufacturing contract with Pinellas;
2. Hill had a duty to inspect the manufacturing of the pipe;
3. Hill breached the Engineering Consulting Agreement ("contract") by allowing use of Class IV wire in the manufacturing of the pipe;
4. Hill breached the contract by failing to direct properly, to perform or to have performed soil survey investigations including, soil resistance to the flow of electric current, total soil acidity, soil drainage (groundwater fluctuations), soil texture, soil microbial activity and soil chemistry;
5. Hill breached the contract by failing to direct properly, to perform or to have performed corrosion testing to determine effects of local soil corrosion conditions on the rate of corrosion of prestressed steel wire embedded in mortar;
6. Hill breached the contract by failing to direct properly, to perform or to have performed investigations of the pipeline route for stray electrical currents, low soil resistivities and aggressive soil and ground water conditions;
7. Hill breached the contract by allowing specifications that did not require the wire to the ductile;
8. Hill breached the contract by approving pipe designs with inadequate safety factors;
9. Hill breached the contract by failing to review design calculations for the individual sections of the pipe;

10. Hill breached the contract by allowing the manufacturer to specify ASTMA-648-73, which is not recognized nor sanctioned in AWWA-C-301-72;

11. Hill breached the contract by approving the use of 17-gauge cylinder steel instead of the specified 16-gauge cylinder steel;

12. Hill breached the contract by specifying only absolute minimum standards and specifications, thereby permitting defective pipe to be made;

13. Hill breached the contract by failing to review all project documents submitted to Pinellas by the manufacturer;

14. Hill breached the contract by failing to specify or to have performed sufficient inspection and testing of materials used in the manufacture of the pipe to ensure the pipe would be manufactured and delivered as required by the specifications;

15. Hill beached the contract by failing to inquire of the manufacturer concerning the use of admixtures that were used in the manufacture of the pipe;

16. Hill breached the contract by having no knowledge of the use of admixtures and failed to inspect the use of admixtures;

17. Hill breached the contract by failing to require the manufacturer to perform any additional tests not specifically mentioned in the standards and specifications, but necessary to ensure the quality and the safety of the manufactured pipe;

18. Hill breached the contract by failing to require that test results of the manufacturer and affidavits or certifications of compliance by the manufacturer be supplied for review;

19. Hill breached the contract by certifying completion of the project without receiving affidavits and certifications of compliance;

20. Hill breached the contract by failing to specify acceptance inspection procedures adequate to identify defective pipe;

21. Hill breached the contract by failing to inspect the work properly;

22. Hill breached the contract by failing to identify incorrect pipe loading and unloading techniques;

23. Hill breached the contract by failing to require the manufacturer to provide samples and specimens of pipe manufactured materials as provided for in the standards and specifications;

24. Hill breached the contract by failing to examine and test materials, samples and specimens;

25. Hill breached the contract by failing to require the manufacturer to provide an affidavit and certifications of compliance at the end of the project;

26. Hill breached the contract by failing to require proper repairs to pipe damaged during transportation or installation;

27. Hill breached the contract by failing to detect that the pipe coating material was mortar rather than concrete as required in the specification;

28. Hill breached the contract in failing in designing the system to provide for sufficient flexibility which would allow Pinellas to operate the pipeline as working pressures up to 150psi;

29. Hill breached the contract by failing to design the system to include a sufficient surge pressure margin or surge protection facilities adequate for the surges which the pipeline will be subjected;

30. Hill breached the contract by failing to design the surge protection facilities properly which were provided, specifically, defective air and vacuum-valve assemblies;

31. Hill breached the contract by failing to take into consideration and to design to prevent the probability that surges would be induced in the pipeline through the operation and the interaction between the Cypress Creek pump station, SK Keller Pump Station, and North Booster station;

32. Hill breached the contract by failing to forewarn Pinellas that the operation or modification of pumps, motors, drives, valves, actuators, and other appurtenances in the pump stations, when acting individually or together, could result in damaging surges being introduced into the pipeline;

33. Hill breached the contract by failing to design, recom-

mend, or advise as to the need for instrumentation to monitor for surges which could damage the pipeline and which could be produced by the operation and interaction between the three pump stations;

34. Hill breached the contract by failing to draft a requirement in the contract between Pinellas and the manufacturer that the manufacturer provide all test results as required to be performed under AWWA-C-301-72;

35. Hill breached the contract by failing to require in the contract between Pinellas and the manufacturer an affidavit and certification of compliance as provided for in AWWA-C-301-72;

36. Hill breached the contract by failing to provide provisions in the contract between Pinellas and the manufacturer that would give a sufficient warranty;

37. Hill breached the contract by failing to provide in the contract between Pinellas and the manufacturer a proper protection clause and recourse against the manufacturer in the event a defective product was supplied;

38. Hill breached the contract by failing to inform Pinellas of its knowledge and understanding that the pipeline would only be expected to last approximately 50 years while the manufacturer consistently maintained that the pipeline would last either indefinitely or at least 100 years;

39. Hill breached the contract by failing to exercise due care in reviewing submittals from the manufacturer which described the prestressed concrete pipe the manufacturer intended to manufacture;

40. Hill breached the contract by allowing the manufacturer to manufacture a lesser quality pipe than was called for in the specifications;

41. Hill breached the contract by failing to reject shop drawings submitted by the pipe manufacturer which included the specification of ASTMA-648-73 which allegedly permitted the manufacturer to use Class IV wire;

42. Hill breached the contract by failing to require the manu-

facturer to meet the requirements of the contract specifications and of Section 1.9 of AWWA-C-301-72, requiring the provision of wire test specimens and other steel test specimens to the purchaser or its agent.
(A:M)

IV. History Of The Trial Court Action.

During the trial, Hill again filed motions for directed verdict and dismissal of claims contained in the breach of contract count against Hill. On September 26, 1989, the trial court denied the motions. (A:P) Having been unsuccessful in dismissing the action, Hill then attempted to attack the trial judge. Following eight (8) months of trial, Hill filed a Motion for Disqualification of the trial judge based on an alleged fear that the trial judge was prejudiced and biased against Hill. Interpace joined the Motion. The trial court denied the Motions for Disqualification on October 17, 1989 finding the motions "legally insufficient". (A:Q) At the time that Hill and Interpace had filed their Motions to Disqualify, there had already been thousands of pages of testimony taken from numerous witnesses. (A:Q:1-2) Thereafter, Hill and Interpace filed Petitions for Writ of Prohibition with the District Court of Appeal, Second District, (hereafter the "District Court"). The District Court no doubt reviewed Hill's accusations very closely. Yet, even under close scrutiny, on October 27, 1989, the District Court *denied* both Interpace's and Hill's Petition for Writ of Prohibition. (A:R,S) Hill filed a Motion for Rehearing and Rehearing En Banc, which was also denied. (A:U)

Shortly thereafter, Hill filed its *second* Motion for Disqualification of the Trial Judge, which was *denied* by the trial court orally on November 6, 1989. Hill then filed its *second* Petition for Writ of Prohibition with the District Court, which was again *denied* on March 8, 1990. (A:T) Hill filed a Motion for Rehearing which was also denied. (A:U) These denials were res judicata of the issue of disqualification raised by Hill in the

subsequent appeal from Final Judgment. *See Nordqvist v. Nordqvist*, 586 So.2d 1282 (Fla. 3d DCA 1991) *citing Reyes v. State*, 554 So.2d 625 (Fla. 3d DCA 1989), *rev. denied*, 562 So.2d 346 (Fla. 1990); *Freeman v. State*, 554 So.2d 621 (Fla. 3d DCA 1989), *rev. denied*, 562 So.2d 345 (Fla. 1990); *Valsecchi v. Proprietors Ins. Co.*, 502 So.2d 1310 (Fla. 3d DCA 1987); *Florida Audubon Soc'y v. Ratner*, 497 So.2d 672 (Fla. 3d DCA 1986), *rev. denied*, 508 So.2d 15 (Fla. 1987).

Consequently, the parties returned for another five (5) months of trial. A judgment was entered by the trial court in favor of Pinellas. The lower court found for Pinellas on all of the breach of contract and negligence claims against Hill. (A:V:10) Following Final Judgment, Hill, and Interpace appealed.

V. History Of The First Appellate Action.

The following issues were raised by Hill on the first appeal: trial judge should have disqualified himself; trial judge erred as a matter of law imposing tort liability on Hill; trial court erred as a matter of law in finding Hill liable for breach of contract based on defects in the pipe segments manufactured by the manufacturer and as a result of the manufacturer's use of class IV (a hybrid and unsanctioned wire outside any national standard) wire in all the pipe segments; trial court's determination that Pinellas' contract with Interpace "merged" with the Hill contract so as to impose additional contractual duties on Hill was legally unsustainable; and award of damages was not sustainable by law or by evidence. (A:W:4-5)

The main focus of Hill's appeal was directed to the issue of disqualification of the trial judge. This issue should not have been given any credence by the District Court in light of the fact that the District Court had already addressed the issue of disqualification pursuant to the three separate Petitions for Writ of Prohibition which were denied. (A:R,S,T) Ultimately, the District Court resolved certain trial issues as a matter of law

and made four important rulings: the trial judge had to be recused; Pinellas could not bring a negligent action against Hill; the contract between Pinellas and Hill on the one hand and Pinellas and Interpace, on the other hand, to which Hill was not a signature — could not be merged so as to impose additional powers and *duties* designated and assumed by Hill as project engineer; Hill's contract imposed no duties on Hill to physically oversee the pipe manufacturing process. *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85, 88-89, (Fla. 2d DCA 1992), *rev. denied*, 613 So.2d 7 (Fla. 1992). (A:G) The District Court disposed of these questions and remanded for a new trial on the sole issue before the appellate court which Hill appealed and which could not be resolved as a matter of law, namely whether Hill breached its contract by permitting the use of Class IV wire on Pinellas' pipeline. The remand of the action was inappropriate because under the controlling law in Florida the disqualification of the trial judge had the affect of rendering void the entire trial. For all practical purposes the trial never happened. *See Bolt v. Smith*, 594 So.2d 864 (Fla. 5th DCA 1992); *Whack v. Seminole Memorial Hosp., Inc.*, 456 So.2d 561 (Fla. 5th DCA 1984).

VI. Remand Of Action To New Trial Judge.

Following the remand, a new trial judge was appointed. At a hearing on March 3, 1993, the lower court had asked the parties to present their views on the issues that remained to be tried. Pinellas contended that in addition to the Class IV wire issue, multiple other breach of contract issues that had been initially plead and found to state a cause of action should be retried. Hill argued that the retrial was exclusively limited to the breach of contract wire issue. The decision does not say that the remaining contractual issues not raised in the appeal were abrogated. *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85 (Fla. 2d DCA 1992), *rev. den.* 613 So.2d 7 (Fla. 1992). (A:G) The trial court erroneously accepted Hill's argument and entered a Final Partial Judgment limiting the retrial to the Class IV wire issue. (A:D)

VII. Constitutional Issues Raised Before The Trial Court.

Pinellas having been denied the right to try its well pled breach of contract issues before the trial court, without ever being provided any opportunity to be heard, immediately filed a Motion for Rehearing. (A:E:2-3) Pinellas alleged that the Partial Final Judgment by the trial court violated Pinellas' due process rights guaranteed by the United States Constitution, in that Pinellas was denied the opportunity to be heard on the well pled breach of contract allegations that were never addressed by the District Court. (A:E:2) Additionally, Pinellas alleged that the Partial Final Judgment resulted in the denial of the fundamental constitutional right of the access to the courts, by denying it the right to proceed in the state trial court with its breach of contract claims. (A:E:2-3) On March 25, 1993, *without hearing*, the lower court entered a judgment denying Pinellas' Motion for Rehearing. (A:F)

VIII. History Of Second Appellate Action Which Is Now The Subject Of This Petition.

Pinellas filed an Appeal with the District Court on April 1, 1993. In its Initial Brief, Pinellas argued that if Hill's legal position was correct, Pinellas would be foreclosed from prosecuting multiple breach of contract claims without the trial court ever disposing of the claims on the merits. (A:Z:15-38) Such a result offends the notion of due process under the Federal Constitution. Pinellas sought the *opportunity* to be heard on these questions which had never been addressed. (A:Z:37-38) Pinellas asserts that when it tried this action before the trial judge, it had offered proof of these breaches of contract itemized on pages 5 through 8 of this Petition. Many of these proofs went unchallenged during the first trial, and taken together constituted a massive breakdown by Hill in the performance of the Engineering Consulting Agreement. When the first appeal was taken, the District Court, for one reason or another, decided that

it would not follow its own earlier decisions denying three Writs of Prohibition. The District Court reversed and remanded the case for a second trial, determining that the trial judge should step down. *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85 (Fla. 2d DCA 1992), *rev. denied*, 613 So.2d 7 (Fla. 1992). (A:G) The remand was for a new trial on the only fact issue which Hill had appealed. However, it is clear from the District Court's decision that it was neither considered nor did it pass upon a host of other asserted contract breaches by Hill. (A:W,Y) The decision does *not* specifically dispose of these other breaches of contract never raised in the first appeal. (A:W,X,Y)

The law of the case doctrine is clear that any issue not appealed and therefore not decided is proper for retrial after remand. *See Two M Development Corp. v. Mikos*, 578 So.2d 829 (Fla. 2d DCA 1991); *Bakker v. First Federal Savings and Loan Association of Hammonton, New Jersey*, 575 So.2d 222 (Fla. 3d DCA 1991); *Marine Midland Bank Central v. Cote*, 384 So.2d 658 (Fla. 5th DCA 1980); *Tri Par Land Development Corp. v. Henthorn*, 241 So.2d 429 (Fla. 2d DCA 1970); *Sax Enterprises, Inc. v. David and Dash, Inc.*, 107 So.2d 612 (Fla. 1958). *See also, Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert.den.*, 459 U.S. 1226 (1983); *Holcomb v. United States*, 622 F.2d 937, 940 (7th Cir. 1980). To have the District Court now rule that Pinellas could not be heard on the remaining alleged breaches of contract is to deny Pinellas its day in court, violating the fundamental constitutional right to the access of courts and right to be heard.

In its Answer Brief, Hill responded to the constitutional right of access to the courts and opportunity to be heard contending that Pinellas was given an opportunity to be heard. (A:AA:3) However, what Hill failed to acknowledge is that Pinellas *never* was given any forum in which to address the validity of the contract claims that were summarily eliminated. Hill certainly cannot contend that all the breaches of contract were addressed in its Initial Brief. Such a contention is unsupported by Hill's brief. (A:W)

Hill also moved the District Court to assign the same panel of judges who heard argument in the prior appeal between the same parties. The first appeal was heard by Chief Judge Danahay and Judges Campbell and Frank. On September 20, 1993, the Second District Court *denied* Hill's Motion for the same panel. Yet, when oral argument was heard by the District Court, the panel consisted of *two* of the three original judges. Judge Danahay and Chief Judge Frank, along with Judge Schoonover sat on the second panel. On February 2, 1994, the District Court filed its Opinion, stating: "Per curiam. Affirmed. *See CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85 (Fla. 2d DCA 1992), *rev. denied*, 613 So.2d 7 (Fla. 1992)." (A:A) It is evident that the District Court chose to *completely* ignore the federal constitutional issues. Pinellas filed a Motion for Rehearing and Rehearing En Banc on February 16, 1994 alleging that it "...has *never* had its day in court concerning its well-pled breach of contract claims which constituted a denial of due process of law." (A:B:2-3) The Motion for Rehearing was denied on March 24, 1994. (A:C)

IX. Jurisdiction Properly Lies With This Court.

28 U.S.C. §1257 permits this Court to review final judgments or decrees rendered by the highest court of a state "...where any title, right, privilege or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of or any commission held or authority exercised under, the United States." Pinellas' fundamental right of access to the courts and opportunity to be heard on its well pled breaches of contract claims has been foreclosed. This Court has previously held that it will find jurisdiction in a case where federal rights are found to be infringed by a state court decree. *See Diamond National Corporation v. State Board of Equalization*, 425 U.S. 268 (1976). Moreover, a decision "...by the highest court of a state in which a decision could be had..." does not mean that the decision must be rendered by the state court of last resort. Pinellas has a "final" decision from the District Court as required by 28 U.S.C. §1257.

See Nash v. Florida Industrial Commission, 389 U.S. 233 (1967). In *Nash*, this Court held a per curiam decision of a Florida District Court of Appeal was the "highest court" in Florida. 389 U.S. at 364-365. The federal constitutional issues have been continuously raised both in the lower court and at the appellate court level on behalf of Pinellas. (A:B,E, Z:37-38) No principal of Florida law explains outright dismissal of well pled contract claims without an evidentiary hearing. Any attempt to refuse to articulate upon a raised constitutional issue by the state court is deemed to be just as reviewable by this Court as if addressed by an express decision. *See, Street v. New York*, 394 U.S. 576 (1969); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). Pinellas has reached the end of the line in the state judicial system, and so under 28 U.S.C. §1257 this Court has the power to review.

REASONS FOR GRANTING THE WRIT

This case presents stark conflicts not only between this Court's decisions but also other federal court decisions. The scope and importance of the ruling in this case is *enormous*, reaching far beyond the State of Florida. A writ of certiorari should be issued to resolve these conflicts and provide direction for the citizens and courts of this nation. Moreover, the decision below is erroneous and the issues it addresses are of utmost importance. The case involves the water supply to a population in excess of 860,736 people. It is for these reasons that Pinellas requests this Court to grant certiorari and enter an appropriate order *summarily* disposing of the February 2, 1994 opinion of the District Court (A:A) and the Partial Final Judgment entered by the trial court on March 3, 1993, (A:D), under the authority of Rule 16.1, Rules of the Supreme Court of the United States. The decisions are clearly erroneous and are contrary to controlling precedent. To allow for further briefing and argument would be a waste of judicial economy. Specifically, the relief sought is a summary order granting certiorari, vacating the judgment, and remanding with instructions to proceed on the merits of the

breach of contract allegations raised by Pinellas against Hill.

I. Certiorari Should Be Granted To Resolve The Conflict Of Legal Principles Raised By The Opinion Of The District Court, And This Court And Other Federal Court Decisions Which Have Interpreted The Application Of The Right Of Access To The Courts And The Opportunity To Be Heard.

A. Denial of the Opportunity to be Heard on Well Pled Allegations Resulting in a Disposal of the Claims for Breach of Contract.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Citations omitted) *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). In *Armstrong*, this Court examined the procedures implemented by a Texas trial court to allow for the adoption of a child *without* the natural father's written consent. The applicable law of Texas required the written consent of the natural father prior to adoption, *unless* the father failed to substantially contribute to the child's support for two years. The natural mother of the child *had* filed an affidavit with the Texas trial court alleging that the father had failed to substantially contribute to the child's support for more than two years. On the same day that the natural mother filed the affidavit, her second husband filed an adoption petition representing that he wanted to adopt the child.
The adoption petition also alleged that the natural father had not substantially contributed to the child's financial support for over two years. *Armstrong*, 380 U.S. at 546-548.

At no time was the natural father given notice of the affidavit or the adoption proceeding; however, the natural father's residence was known at the time. The trial court being fully apprised of these facts proceeded to enter the adoption decree

without the natural father's consent and without providing the natural father with notice of the proceedings before the Texas trial court. Thereafter, when the natural father learned of the adoption, he filed a motion before the same court requesting the court to annul the adoption decree. Eventually, a hearing was held before the trial court in which the natural father was given the opportunity to show that the decree should be annulled, but the motion was denied. The issue before this Court on certiorari review was whether the natural father was ultimately given a sufficient opportunity to be heard. *Id* at 549-550. This Court held that the failure to give the natural father "...notice of the pending adoption proceedings violated the most rudimentary demands of due process of law." *Id* at 550. Further, the evidentiary hearing provided to the father "after the fact" did not undo the injustice. This Court held that the opportunity to be heard:

> "...must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted". *Id* at 552.

The District Court's opinion is in direct conflict with the legal principals set forth by this Court in *Armstrong*, 380 U.S. 545, along with other federal court decisions which recognize "...the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring).

The Ninth Circuit has reviewed a similar factual scenario involving a decision by the Hawaii Supreme Court in *McBryde*

Sugar Company v. Robinson, 504 P.2d 1330 (Haw. 1973), *rehearing den.*, 517 P.2d 26 (1973). *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985). The original state court action was filed in 1959. The subject of the suit was to seek a determination of waters rights. The original parties each owned parcels of land which gave them rights and interest in the water. *Robinson v. Ariyoshi*, 658 P. 2d 287, 292 (Haw. 1982). The trial court entered a judgment awarding quantities of water pursuant to what it determined to be appropriate under the applicable facts and law. *Id.* The judgment delineated "...the rights of the parties with respect to appurtenant water, (footnote omitted) prescriptive water, (footnote omitted) normal surplus water, (footnote omitted) and storm and freshet surplus water (footnote omitted) in the Hanapepe Valley." *McBryde*, 517 P.2d at 29.

On appeal the parties raised many issues. The Supreme Court of Hawaii basically upheld the findings of the lower court with regard to the amount of appurtenant water which belonged to the State, McBryde, and the Small Owners. *Id.* The Supreme Court of Hawaii affirmed in part and reversed in part the lower court's findings as to the amount of appurtenant water that certain parties were entitled to. Further, the Supreme Court of Hawaii also reversed the lower court's finding that McBryde had title to over two million gallons of water per day by prescriptive use. *Id.* at 30. This would have been all well and good if the Supreme Court of Hawaii had stopped there, but it did not. The Supreme Court of Hawaii then made the following decision:

> "...*sua sponte* overruled all territorial cases to the contrary and adopted the English common law doctrine of ripari an rights. (Citation Omitted)." *Robinson*, 753 F.2d at 1470.

As a result of this radical decision, the parties immediately motioned for rehearing. The Supreme Court of Hawaii granted the rehearing and directed the parties to file briefs. Although the parties were not directed to argue constitutional issues pursuant to the granting of rehearing, such issues were raised by some of

the parties. Certain parties contended that the decision of the Supreme Court of Hawaii was a taking of private property without the opportunity to be heard. *McBryde*, 517 P.2d at 47-51 (Marumoto, J. dissenting). After hearing arguments from the parties, the Supreme Court of Hawaii affirmed its earlier opinion. *Id.* at 27.

Following the unprecedented decision by the Hawaii Supreme Court, the parties to the action filed a complaint in the federal district court. *Robinson v. Ariyoshi*, 441 F.Supp. 559 (D. Haw. 1977), *aff'd. in part, vac'd. in part*, 753 F.2d 1468 (9th Cir. 1985), *vac'd. on other grounds*, 477 U.S. 902 (1986). The plaintiffs alleged that the Hawaii Supreme Court had denied the plaintiffs their substantive and procedural due process rights by proceeding to decide issues that had not been tried by the parties in the state court proceeding. The federal district court found that the decision of the Hawaii Supreme Court did violate due process rights because the parties had not been given the opportunity to argue those issues decided by the Hawaii Supreme Court. *Robinson*, 441 F.Supp. 559. On appeal, the Ninth Circuit specifically held:

> If the procedural posture of the state court action had, for some reason, altogether prevented the plaintiffs from raising federal constitutional claims in their petition for rehearing, the federal district court would have had original jurisdiction over those claims. *Wood v. Orange County*, 715 F.2d 1543, 1546-47 (11th Cir. 1983) *cert. denied*, ____ U.S. _____, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984). We are loathe to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation. Like the court in *Wood*, we are concerned that "[s]uch a result might deprive [plaintiffs] of any forum, state or federal, where [they have] a reasonable opportunity to present [their] federal constitutional claims, a result arguably con-

trary to the requirement of due process." *Id.* at 1547. 753 F.2d at 1473, N.2

Similarly, the District Court has denied Pinellas the opportunity to be heard on well-pled breach of contract allegations. The District Court has acted in the same fashion as the Hawaii Supreme Court in *McBryde*, 504 P.2d 1330 (1977). The District Court has foreclosed issues that have never been raised before it, thereby denying the parties an opportunity to be heard. Pinellas has not been given the opportunity to try the well pled breach of contract allegations in any forum. There is no evidence to show that Pinellas has been shuttled off to an alternative dispute resolution to argue its breach of contract claims. Rather, the District Court has unjustifiably closed the courthouse doors to Pinellas.

B. Denial of the Fundamental Constitutionally Protected Right of Access to the Courts.

The constitutional basis for the right of access to the courts is found in the due process clause. *See Wolff v. McDonnell*, 418 U.S. 539 (1974). This Court has further held that the access to courts "...assures that no person will be denied the opportunity to present the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579. The decision of the District Court sub judice hacompletely rejected this Court and other federal court decisions which recognize that there is a fundamental constitutional right to not only be heard but to be allowed the right to access both the federal and state courts. *Hooks v. Wainwright*, 352 F.Supp. 163 (M.D. Fla. 1972).

In *Monroe Division, Litton Business Systems, Inc. v. DeBari*, 562 F.2d 30 (10th Cir. 1977), the plaintiff, Monroe, sued to enforce a provision of its employment contract, which prohibited any employee from competing with Monroe, the employer, for one year after the termination of the contract. The defendant, DeBari, had previously been employed as an assistant branch

manager for Monroe. His contract was terminated on June 27, 1975. Following an evidentiary hearing, the district court issued a preliminary injunction barring DeBari from competing with Monroe or its parent company or any affiliates. However, Monroe was not required to post a bond. Thereafter, DeBari moved the court to enter an order requiring the posting of a bond. Monroe objected to the posting of the bond alleging that the corporation had sufficient funds for security purposes. The court denied the motion holding that it would be inequitable to require the posting of the bond on a preliminary injunction. Ultimately, a trial on the merits was held. The trial court found DeBari had a contract only with Monroe and not with the parent company or other affiliates. A permanent injunction was entered restricting the "non-compete" clause to just Monroe. Following the judgment, DeBari moved the court to enter an order enforcing liability based on the wrongful preliminary injunction and requested to be heard on this issue. The lower court denied DeBari's motion to enforce liability without a hearing. The federal circuit court found that pursuant to the district court's actions, there had been a denial to be heard in a court of law. A party that has properly brought an action before the court is entitled to be heard prior to the court entering an order denying that party's cause of action. 562 F.2d at 33.

The Eleventh Circuit has also specifically held that actions taken by a court can result in a denial of the right to access the courts. *Procup v. Strickland*, 760 F.2d 1107 (11th Cir. 1985). In *Procup*, the district court had originally entered an injunction restricting any further filings of pleadings by a state prisoner. *Procup v. Strickland*, 567 F.Supp. 146 (M.D. Fla. 1983). The Eleventh Circuit, acknowledging the multiple lawsuits filed by Procup, refused to allow the injunction to stand. The Circuit Court of Appeals reversed the lower court's order "[b]ecause the injunction unduly burdens Procup's constitutional right of access to the courts and seeks to absolve the district court of its responsibility to examine prisoners complaints for frivolity or maliciousness on a case-by-case basis..." 760 F.2d at 1109.

Sub judice, the District Court has entered an order that has the same effect as that entered by the federal district courts in both *Procup v. Strickland*, 567 F.Supp. 146 (M.D. Fla. 1983), and *Monroe Division, Litton Business Systems, Inc. v. DeBari*, 562 F.2d 30 (10th Cir. 1977). The District Court has refused Pinellas the opportunity to bring an action for multiple breaches under the Engineering Consulting Agreement (A:H:17-32), thereby unduly denying Pinellas' right of access to the courts. The District Court has attempted to absolve itself and the lower court of what would be a very time-consuming, complex and costly piece of litigation, by limiting the case to the few contract issues brought on appeal by Hill in the first appeal. (A:A) There is no doubt that the second trial will be much more extensive if the multiple contract issues are tried. Yet, there is no excuse for the District Court to enter an irrational and unsupportable opinion which bars Pinellas from bringing causes of action which the state appellate court has never been presented on appeal.

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983), also addressed a private individual's right to bring an action for the denial of the right to access the courts. The Fifth Circuit described the right of access to the courts of this country to be "...basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." *Id.* at 971. Further, the Fifth Circuit explained that "[a] mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be *'adequate, effective,* and *meaningful.' Bounds v. Smith*, 97 S.Ct. at 1495; *see also Rudolph v. Locke*, 594 F.2d at 1078." Id. at 972.

Moreover, in *McKay v. Hammock*, 730 F.2d 1367 (10th Cir. 1984), the Tenth Circuit expressly stated, relying upon *Ryland*, 708 F.2d 967, 971-72 and *Lamar v. Steele*, 693 F.2d 559, 562 (5th Cir. 1982), *cert. den.* 464 U.S. 821 (1983), that a plaintiff does not necessarily have to show that it was prevented from filing a suit in order to assert a denial of the right of access to a court. 730 F.2d at 1375. This is exactly Pinellas' dilemma. Although, it was originally allowed to file a complaint alleging numerous breach

of contract allegations, those well plead allegations were later stricken away by the District Court without so much as one hearing on the issues or merits.

Lastly, in *Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986), the Harrisons filed a federal civil rights action in the federal district court alleging that their constitutional right of access to the courts had been infringed upon by the actions of the City of Springdale and its water and sewer commission. The Harrisons had owned a blueberry farm in Springdale. In 1980, a lift station failed, resulting in raw sewage entering the groundwater and polluting the Harrisons' irrigation water used for the farm. The blueberry crop was destroyed. An investigation by the City of Springdale confirmed that the crop was damaged as a result of the discharged sewage.

The Harrisons originally filed suit in state court seeking damages and injunctive relief from the water and sewer commission. Thereafter, the Harrisons contended that three members of the commission were attempting to force the Harrisons into selling their farm property to the City of Springdale to eliminate their civil suit. Further, the Harrisons claimed that the City threatened to condemn their farm property if the offer to sell was not accepted. The Harrisons declined the offer to sell. A counterclaim was then filed on behalf of the water and sewer commission in the state court action claiming that it had to condemn the Harrisons' farm property out of necessity to be able to resolve the overflow problem. At a hearing before the state court, one of the commissioners admitted that the counterclaim filed against the Harrisons was only done "...as a tactical measure to pressure the Harrisons to settle their damage claim against the Commission." 780 F.2d at 1424. The state trial court dismissed the counterclaim on the ground that there had been no showing of a public purpose for taking.

Following the dismissal of the counterclaim, the Harrisons filed the action in federal court alleging that their constitutional right to the access of court had been infringed by the

commission's attempt to "bully" the Harrisons into voluntarily dismissing the state court action. Specifically, the landowners claimed that their constitutional right of access to the courts had been violated by the City of Springdale and its water and sewer commission, who allegedly conspired to force the Harrisons into a settlement of their pending state action. The Eighth Circuit acknowledged that the facts of *Harrison* presented a somewhat novel twist to the constitutional right to access the courts. It certainly did not fall into the category of "prisoner's rights". Yet, the court found that the constitutional right was clearly defined. "An individual is entitled to 'free and unhampered access to the courts." *United States ex rel. Cleggett v. Pate*, 229 F.Supp. 818, 821-22 (N.D. Ill. 1964)." 780 F.2d at 1427. The circuit court held that Harrisons' stated a cause of action for infringement of their constitutional right to access to the courts. 780 F.2d at 1425.

Sub judice, the District Court's recent decision (A:A), is clearly a denial of Pinellas' constitutional right to access the courts. Hill elected to raise only select contractual issues for appellate review following the entry of the Final Judgment in favor of Pinellas. (A:V,W) Absent from the contractual issues are numerous well-pled breach of contract allegations. Yet, when Pinellas attempted to raise these contract allegations after the first appeal, the lower court refused to hear further argument or evidence on the contract actions. The District Court affirmed the lower court's decision denying Pinellas its day in court. (A:A) Now that the first trial has been nullified, Pinellas is entitled to a trial on those issues which no trial judge or jury have decided and which the District Court never considered. The doctrine of the law of the case mandates a retrial of those issues not appealed and not decided. In *Two M Development Corp.*, 578 So.2d at 830-831, the court held that the law of the case applies to only those issues that were actually considered and decided on the former appeal involving the same action. *Accord, Greene v. Massey*, 384 So.2d 24 (Fla. 1980); *Barry Hinnant, Inc. v. Spottswood*, 481 So.2d 80 (Fla. 1st DCA 1986); *Tri Par Land Development Corp. v. Henthorn*, 241 So.2d 429 (Fla. 2d DCA 1970); *Goodman v. Oslen*,

365 So.2d 393 (Fla. 3d DCA 1978). The federal courts are in agreement with Florida courts holding that the law of the case doctrine only applies to those issues the appellate court addressed. *See also, Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert.den.*, 459 U.S. 1226 (1983); *Holcomb v. United States*, 622 F.2d 937, 940 (7th Cir. 1980).

When the District Court determined that the trial judge should be recused, the final judgment was necessarily vacated and a new trial required. Following the disqualification of the trial judge, the parties were returned to the same position they had occupied immediately prior to the commencement of the first trial. Under law, for all practical purposes, no trial ever occurred. *See Bolt v. Smith*, 594 So.2d 864 (Fla. 5th DCA 1992); *Whack v. Seminole Memorial Hosp. Inc.*, 456 So.2d 561 (Fla. 5th DCA 1984). Therefore, all of the properly plead issues should have been available to litigate upon retrial.

II. The Issues Presented Herein Are Of Fundamental Importance.

The right of the access to courts and the opportunity to be heard is an indispensable right guaranteed by the Constitution. In *Chambers v. Baltimore and Ohio Railroad Co.*, 207 U.S. 142 (1907), this Court characterized the right of access to courts as follows:

> The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges...Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. (Citations omitted) 207 U.S. at 148.

As previously stated, the right to the access of courts is

not to be treated as a mere formal right but requires all courts to provide access that is deemed to be adequate, effective and meaningful. *Ryland*, 708 F.2d at 972, *citing*, *Bounds v. Smith*, 430 U.S. 817 (1977); *see also*, *Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979). The present case shows that the lower court found *for* Pinellas on all of the contract claims which have now been excluded. (A:V) Hill appealed the trial court's ruling. Pursuant to the Florida Rules of Appellate Procedure, Hill identified in its Brief those particular items it was appealing. Rule 9.210, Fla.R.App.P., requires that counsel be vigilant in specifying in the brief for the court the alleged errors committed. In the Initial Appellant's Brief filed by Hill, it did *not* request review by the District Court of the numerous well-pled contract actions of Pinellas. Rather, Hill only requested review of three fact issues which the District Court returned for a new trial. (A:W) The multiple breach of contract claims which are now the subject of this petition were *clearly* not presented to the District Court on the first appeal. Additionally, because of the recusal of the trial judge and the remand for a new trial on the issues not resolved by the appellate court, Pinellas should have had the opportunity to again raise all of its multiple breach of contract issues. Once the judge was ruled to have been recused, the District Court could not reach *any* of the issues it ruled upon including the contract claims it decided as a matter of law. As a result of the recusal of the trial judge, the final judgment was necessarily vacated and a new trial was required. The parties were returned to their original position as far as the allegations in the pending complaint are concerned.

However, when the case was returned to the lower court the new trial judge agreed with Hill's position that the multiple breach of contract claims had been dismissed by the District Court pursuant to its Opinion. *CH2M Hill Southeast, Inc.*, 598 So.2d 85. (A:G) A review of this decision permits elimination of other contract issues only by inference and not even by implication.

Despite the obvious importance that this Court has

acknowledged to lie with the right to the access of courts and the opportunity to be heard, the District Court was determined to wipe out multiple breach of contract claims properly alleged on behalf of Pinellas without ever giving Pinellas the opportunity to be heard on these claims on the *merits*. Motions to Dismiss and objections to these claims had already been denied. (A:I,J,K,L,N,O) The resolution of whether the action taken by the state judiciary in this matter needs to be addressed by this Court. The Florida state judiciary has, without notice to Pinellas, "wiped out" all of its breach of contract claims. Pinellas has never been given an opportunity to argue the validity of its claims. To uphold the decision of the District Court, is to confirm that we no longer have a true system of justice.

Interpace represented the life of the pipeline to be in excess of 100 years when buried in a natural soil environment. Even the lower court's decision, which was later reversed for other reasons, *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85, found that the pipe was not properly manufactured and would not last 100 years or more as represented. (A:V:7-9) Interpace prestressed pipe is and was blowing up all over the country. The first rupture of an Interpace pipeline with Class IV wire was in Michigan in 1975. The Federal Circuit Court of Appeals has confirmed this fact as well. *See City of Richmond v. Madison Management Group*, 918 F.2d 438 (4th Cir. 1990). The reduction in materials including the wire which wraps the pipe (prestressing), the cylinder and the aggregate was done knowingly and deliberately by Interpace which tremendously reduced the strength of the pipe. This reduction should have been caught by Hill and an entire defective pipeline prevented from being placed into public service. (A:H:17-31)

This case is also of importance due to the public's need for dependable water service uninterrupted by the blowing up of pipes throughout Pinellas' 13.5 mile pipeline on a constant intermittent basis causing water shortages and water rationing. There is serious danger in the rupture of one pipe as it could cause the entire system to fail and cause backflow by pulling sep-

tic tanks and other contaminants into the water supply. "Backflow" occurs when the water system is not able to supply the required water to a given area thereby causing a negative pressure to occur in the water distribution lines. This negative pressure draws water into the water distribution lines and ultimately into the water transmission lines and contamination from septic tanks, toilets and other pollution, etc. occurs. "Backflow" creates a substantial health hazard. Under such a threat, it is clear that the *public interest* requires that the line in question be dependable and reliable. The public's right to have its claims of improper engineering must be restored by this Court.

III. The Decision Of The District Court Is Constitutionally Erroneous.

This Court's interpretation that the right to sue and defend in the courts across this county lies at the heart of an orderly judicial system, has been completely disavowed by the District Court. *Chambers*, 207 U.S. 142, at 148 (1907). The District Court cannot purport to have conducted a fact finding mission during the first appellate action because this would impermissibly usurp the role of the trial judge and/or jury. *See Prevatt v. Prevatt*, 462 So.2d 604 (Fla. 2d DCA 1985); *Williams, M.D. v. Dolphin Reef, Ltd.*, 455 So.2d 640 (Fla. 2d DCA 1984). The District Court has taken facts yet to be determined or even raised before the appellate court and decided to take those well-pled facts and allegations *away* with no legal justification. Despite all of this, when the matter came back to the District Court it held that it did indeed purport to conduct a fact finding mission and did indeed resolve the well-pled breach of contract issues without those issues having ever been briefed or presented to the appellate court in the first appeal. Pinellas never had notice that its unappealed contract claims were in jeopardy on the first appeal. This is why Pinellas has never been heard with its rights summarily eliminated.

The question that must be asked is whether the appellate courts can decide factual issues on appeal that are never pre-

sented by the parties involved in the appeal. Additional confusion is only added when the action is remanded for a new trial because the previous trial judge is recused. The appellate court cannot recuse a trial judge and proceed to resolve issues of fact or law.

It is impossible to understand how the multiple breach of contract allegations could be disposed of by the District Court if such actions are not brought to the court's attention. To the contrary, the law set forth in Florida (and in the federal courts) holds that the law of the case doctrine can only apply to those issues that were actually considered and decided on a former appeal involving the same action. *See Two M Development Corp. v. Mikos*, 578 So.2d 829 (Fla. 2d DCA 1991); *Greene v. Massey*, 384 So.2d 24 (Fla. 1980). *See also, Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); and *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert.den.*, 459 U.S. 1226 (1983). On remand for new trial, only those issues actually appealed and considered are resolved with finality. *See Tri Par Land Development Corp. v. Henthorn*, 241 So.2d 429 (Fla. 2d DCA 1970); *Sax Enterprises, Inc. v. David and Dash, Inc.*, 107 So.2d 612 (Fla. 1958). Lastly, if no appeal is taken on one point but the case is appealed on another, then the first point becomes the law of the case and upon a reversal, that law of the case remains as correct and cannot be revisited. The application of this principal absent recusal would have required affirmance of the judgment against Hill. *See Marine Midland Bank Central v. Cote*, 384 So.2d 658 (Fla. 5th DCA 1980); *Tillman v. Smith*, 560 So.2d 344 (Fla. 5th DCA 1990). *See also, Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, *cert. den.*, 96 S.Ct. 1725, 425 U.S. 950, 48 L.Ed.2d 194, *on remand* 465 F.Supp. 478.

The District Court, by ignoring the federal issues raised by Pinellas in the prior state court proceeding, was able to summarily dismiss Pinellas' constitutional right to the access of courts and the opportunity to be heard on the merits. The facade

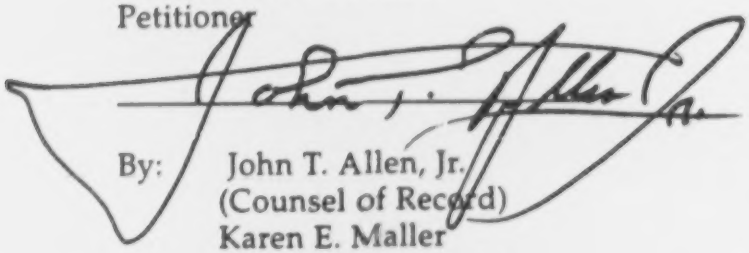
that Pinellas has in fact been given an opportunity to raise the issues before the court in state court litigation is grossly misleading. The bottom line is that a review of the events that have taken place in the Florida court system evidences that Pinellas has never been provided the opportunity to do anything other than to plead numerous breach of contract claims. Pinellas was never given any further right to have these issues raised, heard, or tried by a Florida court.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted and the appropriate order be given to summarily dispose of the opinion of the District Court in and for the State of Florida on the merits, and also the decision of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas, Florida.

Respectfully submitted,

PINELLAS, FLORIDA
Petitioner



By: John T. Allen, Jr.
(Counsel of Record)
Karen E. Maller
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4508 Central Avenue
St. Petersburg, FL 33711
(813) 321-3273
Counsel for Petitioner

June, 1994

Supreme Court, U.S.
FILED

93 2071 MAY 2 2 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

Appendix To
Petition For A Writ Of Certiorari
To The District Court of Appeal, Second District, State of Florida

PETITION FOR A WRIT OF CERTIORARI

John T. Allen, Jr.
(Counsel of Record)
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Counsel for Petitioner

16 pgs

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APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PINELLAS COUNTY, FLORIDA,

Appellant,

v.

CH2M HILL SOUTHEAST, INC., CLEVEPAK CORPORATION, MADISON MANAGEMENT GROUP, INC., as successor of INTERSPACE CORPORATION,

Appellees.

CASE NO. 93-01203

Opinion filed February 2, 1994.

Appeal from the Circuit Court for Pinellas County; Howard P. Rives, Judge.

John T. Allen, Jr. of John T. Allen, Jr., P.A., St. Petersburg; Michael J. Keane and Sarah M. Chaves of Baynard, Harrell, Ostow & Ulrich, P.A., St. Petersburg, for Appellant.

Arthur J. England, Jr. and Charles M. Auslander of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami; and Benjamin H. Hill, III, of Hill, Ward & Henderson, Tampa, for Appellee, CH2M Hill Southeast, Inc.

PER CURIAM.

Affirmed. *See CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85 (Fla. 2d DCA), *rev. denied*, 613 So.2d 7 (Fla. 1992).

FRANK, C.J., and DANAHY and SCHOONOVER, JJ., Concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

PINELLAS COUNTY, FLORIDA,

Appellant,

-vs- Appeal No. 93-01203

INTERPACE CORPORATION; CLEVEPAK CORPORATION; MADISON MANAGEMENT GROUP, INC., as successor of INTERPACE CORPORATION; and CH2M HILL SOUTHEAST, INC.,

Appellees.
_____/

MOTION FOR REHEARING PURSUANT TO RULE 9.330, FLORIDA RULES OF APPELLATE PROCEDURE AND FOR REHEARING EN BANC PURSUANT TO RULE 9.331, FLORIDA RULES OF APPELLATE PROCEDURE

PINELLAS COUNTY files this its Motion for Rehearing pursuant to Rule 9.330, Florida Rules of Appellate Procedure and for Rehearing *En Banc* pursuant to Rule 9.331, Florida Rules of Appellate Procedure, directed to the decision of this Court rendered on February 2, 1994, and states:

Petitioner for Rehearing
(Rule 9.330)

Pinellas County respectfully contends that this Court has misapprehended or overlooked certain points of law and fact which are central to the determination of this appeal:

A. The specification sheet submitted by Interpace Corporation to the Engineers, CH2M Hill Southeast, Inc. ("Hill"),

addresses not only Class IV wire — an issue left for retrial in *Hill I* — but also concerns mortar coating, core concrete, steel cylinder, and other critical features of the prestressed concrete pipe design. See Exhibit "A."

B. Just as Hill reviewed the specifications concerning Class IV wire, it reviewed the specifications for each of the other design parameters to ensure conformity to the design of improvements by the Engineers.

C. The Engineers were required to check shop drawings and descriptive data submitted by Interpace to ensure general conformity to the plans and specifications.

D. Hill Engineers undertook to do just that.

E. Further, Hill was required to provide *complete bases* of design, and undertook to do so.

F. In its design work, Hill failed to specify certain optimal checks and balances set forth in AWWA C-301-72 which in turn would have required the manufacturer to conduct certain tests, to submit the results for review and the like.

G. These obligations of the Engineer arose only under its contract in Section A and B.

H. This Court may have been misled by arguments to the effect that Hill had no duties under *Section C* of its contract. The claims which Pinellas County seeks to prosecute *do not* arise under *Section C* of the Hill Contract — only Sections A and B.

I. Hill was paid on the basis of a percentage of the cost of construction — which *included* the cost of the pipe constructed by Interpace.

J. Hill never appealed the contract claims lodged against the Hill Engineers for failure to discharge these aspects of their contract responsibilities.

K. This Court never purported to pass upon such contract claims in its decision in *Hill I*, 598 So.2d 85.

L. Pinellas County has *never* had its day in court concerning its well-pled Hill contract claims — a denial of due process of law.

M. For these reasons, Pinellas County respectfully asserts that this matter should be reheard, reconsidered and remanded for a trial on all contract claims which were pled under Sections A and B of the Hill Contract.

B - 3

Petition for Rehearing En Banc

(Rule 9.331)

The purpose of Rule 9.331, Florida Rules of Appellate Procedure, in part, is to provide a vehicle for district courts of appeal to maintain decisional uniformity within the districts.

The district courts are free to fashion their own notion of decisional uniformity. Express "conflict of decisions," as that term is understood, regarding Supreme Court jurisdiction is not required to trigger a rehearing en banc under Rule 9.331.

The decision of this Court is not uniform or consistent with *Two M Development Corp. v. Mikos*, 578 So.2d 829 (Fla. 2d DCA 1991). Instead, it seriously departs from that decision which enunciates the doctrine of the law of the case in that as the arguments before this Court reflect — Pinellas County, if this decision is allowed to stand, will be deprived of its opportunity to try issues which were never appealed in *Hill I*.

The *Mikos* decision teaches that on remand if issues exist which were never presented for appellate review and never considered — they remain open and are fair game for a subsequent trial.

In the instant situation, numerous contract claims fairly pled by Pinellas County under the Engineer's contract were never made the subject of any brief submitted to this Court in *Hill I* nor were they argued to or decided by this Court. The effect of the affirmance of the Partial Final Judgment is to deprive Pinellas County of its opportunity under the doctrine of the law of the case to try those issues which necessarily have not been resolved.

When this Court in *Hill I* determined to disqualify the sitting trial judge, it was as though no trial occurred in the first instance. Consequently, any issues which required a disposition by the trier of fact had to be necessarily sent back for retrial.

Notwithstanding that clear proposition, the panel of this Court which has affirmed this appeal without opinion has sorely missed the mark and misapplied the *Mikos* decision.

Although a per curiam affirmance by the Court does not create a written opinion which other combatants in the Second District Court of Appeal can compare to the *Mikos* decision and recognize disharmony with it — this case is certainly a high profile

case involving millions of dollars of damage suffered by the water users of Pinellas County. To those who have followed this case, there is plainly a failure of this Court to follow its own decisional law which creates the disharmony which Rule 9.331, Florida Rules of Appellate Procedure, was intended to remedy.

For these reasons, Pinellas County respectfully prays for a rehearing *en banc*.

I express a belief, based on a reason and studied professional judgment, that the panel decision is contrary to *Two M Development Corp. v. Mikos*, 578 So.2d 829 (Fla. 2d DCA 1991) of this Court and that a consideration by the full court is necessary to maintain uniformity of decisions in this Court, namely with:

Two M Development Corp. v. Mikos, 578 So.2d 829 (Fla. 2d DCA 1991)

JOHN T. ALLEN, JR. of
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FBA No. 257516

Attorneys for Pinellas County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to ARTHUR J. ENGLAND, JR., ESQ. and CHARLES M. AUSLANDER, Greenberg, Traurig, Hoffman, Lipoff, etc., 1221 Brickell Avenue, Miami, Florida, 33131-3260; and BENJAMIN H. HILL, III, ESQ., Hill, Ward & Henderson, Post Office Box 2231, Tampa, Florida, 33601, this 16th day of February, 1994.

_____

MICHAEL J. KEANE

Exhibit A to Appendix B

INTERPACE Corporation SPECIFICATION NO. LC-77-1-1

FOR 60" PRESTRESSED CONCRETE EMBEDDED CYLINDER PIPE W/RUBBER & STEEL JOINT (SP-12)
WATER SYSTEM IMPROVEMENTS
PINELLAS COUNTY, FLORIDA
BLACK, CROW & EIDSNESS, INC. - ENGINEERS

SZE DRAWING INTERPACE Engineering Manual, Section 1, Pg. 7, Section 1, Page 9

Nominal Pipe Diameter - inches	60	60
Class Designation	A	A
Approximate Footage - feet	59,435	
Min.Cyl. t - ASTM A-569 (Min. Yield = 27,00 psi); or A-570-72 Gr. B or C; or A-611-72 Gr.C. or E-inch	0.0538	0.0538
Nominal Cylinder Diameter - inches	63	63
Cylinder Test Pressure - psi	43	43
Wire Size - ASTM A 227-71 and A 648-73	#8	#8
Wire Class	IV	IV
Wire Area - sq.in./ft. = (A_s)	0.403	0.437
No. of Wraps of Wire - per ft.	19.56	21.21
Min. Ultimate Wire Strength - psi = (f_{su})	293,000	293,000
Wire Wrapping Stress - psi = (f_{sg})	219,750	219,750
Dynamometer (1 wire) - lbs.	4,530	4,530
($A_s f_{sg}$) = (.75 $A_s f_{su}$) - lbs/lf. (See Note A)	88,559	96,031
Pressure at zero concrete compression - psi	171	178
Resultant Compression in Concrete - psi	1,090	1,330
Min. compressive strength of concrete at time of wrapping (Rodded or Vibrated Cylinders) - psi		

Core Thickness (including cylinder) - inches	4-1/2	3-3/4
Min. Coating Thickness - inches	7/8	7/8
Zinc Coated Joint Rings:		
Spigot Ring Width - inches	6-1/4	4-1/4
Bell Ring - inches x inches	1/4 x 6	
1/4 x 6		
Joint Depth - inches	4-1/4	4-1/4
Creep - feet	0.03	0.03
Average Laid Length - feet	20.03	20.03

Calculation Date: $n_i = 7.0$, $n_r = 6.0$, $R_1 = 0.05$, $R_2 = 0.05$, $C_r = 2.00$

Design Conditions:
In Accordance with AWWA Specification C301-72

Design Pressure - psi	150	150
Water Hammer Allowance - psi	60	60
Max. Cover - feet	6	6

NOTES: 1. All bevels and outlet pipe to be manufactured with 4-1/2" core.

2. For details on special fittings see Specification Sheet LC- 77-1-4 and 5.

3. BELL BOLT Joints to be manufactured with 4-1/2" core.

NOTE A: Should material shortages require use of alternate size or strength wire, wire area, No. of wraps, wrapping stress and Dynamometer values will be varied as required to maintain the value of (Asfsq) as shown.

LJ06012160 LJ06012170

COMPILED____CHECKED____APPROVED____DATE____

APPENDIX C

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

MARCH 24, 1994

PINELLAS COUNTY, FLORIDA, Appellant(s), v. INTERPACE CORPORATION, et al., Appellee(s)	)	Case No. 93-01203

BY ORDER OF THE COURT:

Counsel for the appellant, having filed a motion for rehearing and rehearing en banc in the above-styled case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Michael J. Keane, Esq.
John T. Allen, Jr., Esq.
Benjamin H. Hill, III, Esq.
Arthur J. England, Jr., Esq.
Charles M. Auslander, Esq.

/JM

APPENDIX D

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY, CIVIL DIVISION

PINELLAS COUNTY, FLORIDA

Plaintiff,

vs. CASE NO.: 83-13313-7

INTERPACE CORPORATION;
CLEVEPAK CORPORATION;
MADISON MANAGEMENT GROUP, INC., AS SUCCESSORS OF INTERPACE CORPORATION; AND
CH2M HILL SOUTHEAST, INC.,

Defendants.
_____/

FINAL PARTIAL JUDGMENT IN FAVOR OF CH2M HILL SOUTHEAST, INC.

Pursuant to the Appellate Court opinion rendered in this action

IT IS ADJUDGED that the Plaintiff, PINELLAS COUNTY, take nothing by this action with respect to all claims and issues save one, and that the Defendant, CH2M HILL, go hence without day as to all claims and issues save the one specified herein. The issue excluded from this judgment is the issue remanded to the trial court, which arises from Pinellas County's allegations that CH2M HILL breached its contractual design responsibilities by allowing the pipe manufacturer to use Class IV wire for the pipeline. The Court hereby reserves jurisdiction to determine the amount of taxable costs to be awarded to CH2M HILL.

ORDERED in St. Petersburg, Florida, on March 3, 1993.

_____

Judge

KARLEEN F. DEBLAKER, CLERK
RECORD VERIFIED BY: as

APPENDIX E

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

IN AND FOR PINELLAS COUNTY, FLORIDA

CIRCUIT CIVIL NO. 83-13313-07

PINELLAS COUNTY,

Plaintiff,

-vs-

INTERPACE CORPORATION,
CLEVEPAK CORPORATION, and
MADISON MANAGEMENT GROUP, INC.,
as successor of INTERPACE
CORPORATION, and CH2M HILL
SOUTHEAST, INC.,

Defendants.
_____/

MOTION FOR REHEARING OF FINAL PARTIAL JUDGMENT IN FAVOR OF CH2M HILL SOUTHEAST, INC.

Plaintiff, PINELLAS COUNTY, FLORIDA, moves for rehearing of the Final Partial Judgment in Favor of CH2M HILL SOUTHEAST, INC. entered March 5, 1993 on the following grounds:

1. The Final Partial Judgment is a judgment in favor of Defendant, CH2M HILL SOUTHEAST, INC. ("HILL"), on *all* breach of contract claims brought by Plaintiff, PINELLAS COUNTY, against HILL except for the issue of whether HILL breached the contract by allowing the manufacturer to use Class IV wire.

2. In its First Amended Complaint, PINELLAS COUNTY alleged that HILL was responsible for numerous breaches of its contract, not just the allowance of Class IV wire. The Final

Judgment entered after the non-jury trial was a judgment for Plaintiff on *all* alleged breaches, not just the issue of Class IV wire.

3. HILL did not appeal most of the breaches of contract for which the trial judge entered a judgment against HILL. Concerning breaches of contract, HILL's appeal was limited to its duty to inspect the manufacture of pipe segments, whether the doctrine of merger imposed on HILL a duty under PINELLAS COUNTY'S contract with the pipe manufacturer, and whether HILL breached its duty by allowing the pipe manufacturer to use Class IV wire. None of the other numerous contractual breaches alleged by PINELLAS COUNTY and found by the trial court was considered by the Second District Court of Appeal.

4. In its opinion, the Second District ruled that as a matter of law HILL had no duty to inspect the manufacture of the pipe, was not responsible for duties imposed by the manufacturing contract with PINELLAS COUNTY, and remanded the case for a new trial concerning breach of duty by allowing the pipe manufacturer to use Class IV wire.

5. Further, by finding that Judge Bryson should have been disqualified, the Court rejected all factual findings and for that matter negated the entire trial.

6. The Final Partial Judgment denies PINELLAS COUNTY due process concerning the other contractual breaches alleged in the Complaint because it purports to enter judgment for HILL on all alleged contractual breaches even those on which PINELLAS COUNTY has now never had a trial on any of those issues.

7. The Partial Final Judgment violates PINELLAS COUNTY'S due process rights guaranteed by the Florida and United States Constitutions in that it denies PINELLAS COUNTY an opportunity to be heard on the contractual breaches not considered by the Second District Court of Appeal.

8. The Partial Final Judgment denies PINELLAS COUNTY its fundamental right first to a trial and later to appellate review thereby denying PINELLAS COUNTY access to the courts.

9. For the reasons stated above, PINELLAS COUNTY moves for a rehearing of the Final Partial Judgment.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOHN T. ALLEN, JR., ESQ., 4508 Central Avenue, St. Petersburg, Florida, 33711; and

DAVID T. KNIGHT, ESQ., Post Office Box 2231, Tampa, Florida, 33601 this 15th day of March, 1993.

MICHAEL J. KEANE of
BAYNARD, HARRELL, MASCARA,
OSTOW & ULRICH, P.A.
Post Office Box 180
St. Petersburg, FL 33731
(813) 823-5000
SPN NO. 00176393
FBA NO. 257516
Attorney for Plaintiff

APPENDIX F

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY
Circuit Civil, Case No. 83-13313-07

PINELLAS COUNTY,

Plaintiff,

vs.

INTERPACE CORPORATION,
CLEVEPAK CORPORATION, and
MADISON MANAGEMENT GROUP, INC.,
as successors of INTERPACE
CORPORATION, and CH2M HILL
SOUTHEAST, INC.,

Defendants.
_____/

ORDER DENYING MOTION FOR REHEARING

THIS CAUSE having come before the Court upon the Plaintiff's Motion for Rehearing of Final Partial Judgment in Favor of CH2M Hill Southeast, Inc., entered March 3, 1993, and the Court having reviewed the Motion along with its order granting final partial judgment in favor of CH2M Hill Southeast, Inc., and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion for Rehearing of Final Partial Judgment in Favor of CH2M Hill Southeast, Inc. is DENIED.

DONE AND ORDERED in Chambers, St. Petersburg, Pinellas County, Florida, this 25th day of March, 1993.

_____
Howard P. Rives
Circuit Judge

Copies furnished to:
John T. Allen, Esq.
David T. Knight, Esq.
Michael J. Keane, Esq.

APPENDIX G

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CH2M HILL SOUTHEAST, INC., and MADISON MANAGEMENT GROUP, INC., Appellants,	)	
v.	)	Case Nos. 90-02027
	)	90-02028
PINELLAS COUNTY, FLORIDA,	)	90-03562
	)	90-03563
Appellee.	)	
	)	CONSOLIDATED

Opinion filed March 13, 1992.

Appeals from the Circuit Court for Pinellas County; Fred L. Bryson, Judge.

Stephen M. Bull and Guy S. Haggard of Bull & Haggard, Orlando; and Arthur J. England, Jr., Linda Ann Wells, and Charles M. Auslander of Fine Jacobson Schwartz Nash Block & England, Miami, for Appellant CH2M Hill Southeast, Inc.

Jeffrey S. O'Brien of Masterson,

Rogers, Patterson, Masterson, O'Brien & Lopez, P.A., St. Petersburg; and G. Lee Garrett, Jr. and Stephen O. Kinnard of Jones, Day, Reavis & Pogue, Atlanta, for Appellant Madison Management Group, Inc.

John T. Allen, Jr., of John T. Allen, Jr., P.A., St. Petersburg; Michael J. Keane of Baynard, Harrell, Mascara, Ostow & Ulrich, P.A., St. Petersburg; and Alan C. Sundberg and Sylvia H. Walbolt of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellee Pinellas County.

DANAHY, Acting Chief Judge.

The appellant CH2M Hill Southeast, Inc., (Hill) is the successor to Black, Crow & Eidsness, Inc., which was the design engineer for a water distribution pipeline running 13.5 miles from the Pasco-Pinellas County line into Pinellas County and described by Pinellas County as the heart of its water system. The appellant Madison Management Group, Inc., (MMG) is the successor to Interpace Corporation, which manufactured the pipeline segments. Each appellant separately appeals from a final judgment awarding compensatory damages of 19.8 million dollars against them and in favor of Pinellas County, and 5 million dollars in punitive damages against MMG, based on a determination by the trial judge as trier of fact that the pipeline is defective and must be completely replaced. For the reasons stated in this opinion, we reverse the final judgment, vacate the cost award, and remand for a new trial.

On March 24, 1975, Hill's predecessor entered into a contract with Pinellas County to perform specified engineering services in connection with the design of the pipeline which is the subject of this litigation (the "Hill Contract"). The pipeline was to consist of 3,400 pipe segments, each approximately 20 feet in length. The pipe segments were to be made with a concrete inner

core, steel cylinder, concrete outer core wrapped with high-strength wire, and covered with slurry and mortar coatings. For its design of the pipeline, Hill's predecessor was paid a fee of $364,939.27.

On February 25, 1977, MMG's predecessor, Interpace, formally executed a contract with the County to manufacture the pipeline segments (the "Interpace Contract"). Hill was not a signatory nor a party to this contract. The contract was awarded to Interpace as the lowest responsive bidder on the project. Throughout the summer of 1978, Interpace manufactured the pipeline segments at its Lacoochee, Florida, plant. The pipeline segments were delivered by truck to the job site and installed. On October 2, 1978, the County accepted the pipeline, and it began operation.

Over time, the County became convinced that at least some of the pipeline segments were defective and that the integrity of the entire pipeline was in doubt. In November 1983 the County filed this damage action against Hill and MMG. The nonjury trial began in January of 1989 and ended in January of 1990, producing a trial transcript of more than 14,000 pages. The record on appeal is contained in 265 volumes with an index of 437 pages, and the final judgment is 200 pages long.

We appreciate and are sensitive to the great amount of judicial labor required in a nonjury trial of such length involving complicated issues. We are also aware of the significance of this case and its outcome to the residents of Pinellas County. Notwithstanding, for the reasons set forth below and based upon the analysis undertaken in this opinion, we are constrained to reverse because of trial events which occurred in October of 1989. We cannot ignore the wealth of settled law commanding the result we reach in this matter.

On September 20, 1989, the County had completed presentation of its case in chief and Hill had presented its case. When proceedings resumed on October 10, Stephen Schooley, a younger member of Hill's trial team, presented a lengthy written motion by Hill to disqualify the trial judge. At his request, Mr. Schooley was allowed to present the motion "in open court," and he proceeded to review its allegations. He stated that the grounds for the motion arose from the trial judge's conduct throughout the trial, which cumulatively convinced Hill, the client, that the trial judge was biased in favor of the County. Mr. Schooley's presentation con-

sumed 22 pages of the trial transcript. At its conclusion, the trial judge said to Mr. Schooley that the motion involved matters which "exceed the duties and boundaries and parameters of advocacy, but go into another area which I will charitably not describe."

The trial judge then invited MMG to join in the motion, and MMG did in fact file a similar motion to disqualify. The trial judge said he had no intention of "ruling on it today." He stated that he would hear counsel for the County in argument on the motion. The proceedings on October 10 concluded with these remarks from the trial judge:

> It reminds me of a story, this motion does, and the framework of this case, of—two days before Christmas, a good samaritan was walking home in the snow. In his arm were two sacks—arms were two sacks of groceries, and in one sack was a ham.
>
> A fellow that was down on his luck came out of the alley and said, "Sir, would you give me something to eat? I'm hungry." The good samaritan gave him the hamhock from the ham.
>
> And the next night, the good samaritan's walking down the same place. It's dark and in the snow. And the fellow he'd given the ham to, by that time, had eaten all the ham and thought that, within his province, whatever he was doing, it would be appropriate to attempt to rob the good samaritan with the hamhock.

When proceedings resumed the next morning, the trial judge told Mr. Schooley that he would afford him the opportunity to withdraw the motion to disqualify. Mr. Schooley declined on behalf of Hill and suggested that the trial judge was not permitted to proceed further with respect to the disqualification issue. The trial judge said, however, that he was going to hear counsel for the County on the matter. He told Mr. Schooley:

> Many years ago, someone told me that there were basically two types of untruths; lies and damn lies. But you, sir, in your motion, have crystallized yet a third one.

> And up to this point, it was a peephole, and now it's a broad horizon. And that is, quoting out of context.
>
> You, sir, in your motion, have taken liberties with the truth that a common cur would not take with a street-side fireplug.

Five days later, on October 16, counsel for the County presented arguments against the motions to disqualify, arguments which consumed almost 100 pages of the trial transcript. The trial judge denied the motions.

Section 38.10, Florida Statutes (1989), and Florida Rule of Civil Procedure 1.432 govern disqualification of a trial judge. Both the statute and the rule are clear that upon presentation to the trial judge of a legally sufficient motion by a party to disqualify, the trial judge *shall proceed no further*. The trial judge may not debate the allegations contained in the motion, pass on the truth of its allegations, or adjudicate the question of disqualification. *See Townsend v. State*, 564 So.2d 594 (Fla. 2d DCA 1990). The trial judge's actions in this case exceeded the proper scope of his inquiry. It was error for him to continue in the case and a new trial is required.

We hold further that Hill is entitled to judgment as a matter of law on all issues save one, and the new trial as to Hill shall be limited to the one issue dealt with below.

The County asserted claims against Hill based on tort liability and liability for breach of contract. It is a well established rule in Florida that tort damages are not recoverable in a breach of contract action, absent an accompanying independent tort. *Lewis v. Guthartz*, 428 So.2d 222 (Fla. 1982). To have an actionable tort claim in a breach of contract case, there must be appropriate pleadings and proof of conduct resulting in personal injury or property damage beyond the breach of the contract. *J. Allen, Inc. v. Humana of Florida, Inc.*, 571 So.2d 565 (Fla. 2d DCA 1990). A plaintiff may not recover damages on a theory of liability not pled. *Lee County Bank v. Winson*, 444 So.2d 459 (Fla. 2d DCA 1983). In this case the County failed to plead an independent tort separate from its breach of contract claim against Hill.

In Count IX of its amended complaint titled "Negligence Against CH2M Hill Southeast, Inc.," the County alleged:

> 66. The Defendant, CH2M HILL SOUTHEAST, INC., carelessly and negligently performed its duties owed to the Plaintiff, PINELLAS COUNTY, under their contract, Plaintiff's Exhibit "B," in the following manner:

In Count X titled "Breach of Contract of CH2M Hill Southeast, Inc.," the County alleged:

> 70. The Defendant, CH2M HILL SOUTHEAST, INC., breached its contract with the Plaintiff, PINELLAS COUNTY, in the manner described in Paragraph 66.

Thus, the County itself characterized Hill's "negligence" in the performance of the contract as in fact constituting the breach of the contract. The County argues that Hill waived any deficiency in the pleadings because it never objected at trial to the County's reference to statutes and regulations, upon which the County bases its tort theories, as being beyond the scope of the pleadings. We disagree. Because the County failed to plead a separate and independent tort, it is foreclosed from recovery in this action against Hill on any tort theory of liability.

With respect to the breach of contract claim, it was the position of the County that Hill had the contractual responsibility to oversee the manufacture of the pipeline segments. The County argued that the Hill Contract imposed such duties on Hill. Our reading of the Hill Contract, a function wholly within our scope of review, *Folwell v. Bernard*, 477 So.2d 1060 (Fla. 2d DCA 1985), has led us to the opposite conclusion. We find no provision in that contract which imposed upon Hill a responsibility with respect to the pipe manufacturing process.

But the County further argues that responsibilities for the pipe manufacturing process were imposed upon Hill in the Interpace Contract, even though Hill was neither a party nor a signatory to that contract. The County reaches this conclusion based on application of the doctrine of contract merger. In support of its argument, the County cites two cases: *J.M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So.2d 484 (Fla. 1957), and *Northwestern Bank v. Cortner*, 275 So.2d 317 (Fla. 2d DCA 1973). Each of these cases applied the doctrine of merger to allow two contracts to be read together. The contracts in each case were closely related in

time. But in neither case did the court impose contract obligations under the second contract on a party to the first contract who was not also a party or a signatory to the second contract. It remains the rule in Florida that ordinarily a contract cannot bind one who is not a party thereto or had not in some fashion agreed to accept its terms. To create a valid contract there must be reciprocal assent to a certain and definite proposition. *In re Estate of Donner*, 364 So.2d 742 (Fla. 3d DCA 1978). No responsibilities contained in the Interpace Contract could be imposed upon Hill by "merger" of the Interpace Contract and the Hill Contract.

Additionally, the County asserted that Hill had breached its contractual design responsibilities by allowing the pipe manufacturer to use class IV wire for the pipeline. That is an issue of fact which must be determined in a new trial.

Finally, we have *sua sponte* consolidated the instant matter with Case Nos. 90-03562 and 90-03563 for decisional purposes. Thus, in light of our determination to reverse and remand this proceeding for a new trial, we vacate the cost award challenged by MMG and Hill in Case Nos. 90-03562 and 90-03563.

Reversed and remanded for new trial in accordance with this opinion.

CAMPBELL and FRANK, JJ., Concur.

APPENDIX H

Excerpts of the Complaint for Negligence, Breach of Implied Warranty of Fitness for Intended Use, Breach of Implied Warranty of Merchantability, and Strict Liability in Tort

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 83-13313-12

PINELLAS COUNTY, a political subdivision of the State of Florida,

Plaintiff,

vs.

INTERPACE CORPORATION, a foreign corporation; GHA LOCK JOINT, INC., a foreign corporation; CH2M HILL SOUTHEAST, INC., a Florida corporation formerly known as Black, Crow and Eidsness, Inc., a Florida corporation; BUMBY & STIMPSON, INC., a Florida corporation, and SUWANNEE TRANSFER, INC., a Florida corporation,

Defendants.
_____/

COMPLAINT FOR NEGLIGENCE, BREACH OF IMPLIED WARRANTY OF FITNESS FOR INTENDED USE, BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY, AND STRICT LIABILITY IN TORT

The plaintiff, PINELLAS COUNTY, by its undersigned attorney, sues the defendants, INTERPACE CORPORATION, a foreign corporation, and GHA LOCK JOINT, INC., a foreign corporation, and avers:

COUNT I
NEGLIGENCE

1. At all times material to this complaint, the plaintiff, PINELLAS COUNTY, is a political subdivision of the State of Florida.

2. At all times material to this complaint, INTERPACE CORPORATION is a foreign corporation organized and existing under the laws of the State of Deleware who is authorized to do business in the State of Florida.

3. At all times material to this complaint, GHA LOCK JOINT, INC., is a foreign corporation organized and existing under the laws of the State of Deleware who is qualified to do business in the State of Florida.

4. In March of 1975, the plaintiff, PINELLAS COUNTY, executed an agreement with the consultant engineer, Black, Crow and Eidsness, Inc., for the design of a transmission main and selection of a route from the point of termination of the Cypress Creek transmission main which is located at the Pasco-Pinellas County line to the North Booster Station located on U.S. 19 north of S.R. 580. In February of 1977, PINELLAS COUNTY executed a contract with INTERPACE CORPORATION for the furnishing of approximately 63,400 linear feet of prestressed concrete pipe 60-inches in diameter and 8,160 linear feet of prestressed concrete pipe 54-inches in diameter together with other fittings and specials. On March 15, 1977, the County executed a contract with BUMBY & STIMPSON, INC. for the installation of the 60-inch diameter and 54-inch diameter transmission mains together with fittings and other specials, large butterfly valves, magnetic meters and other appurtenances which had been purchased by the County and for the furnished and installation of other materials, fittings and appurtenances necessary for the operation of the completed transmission mains. All parties to the bid and in fact all defendants named in this complaint knew before entering into any obligation by said defendants in relation to said transmission lines that both the 54-inch diameter and in particular the 60-inch diameter transmission line, described above, would constitute the heart of the Pinellas County Water System and would supply water to all retail customers of the Pinellas County Water System and five wholesale customers of the Pinellas County Water System who are Pasco County and four municipalities located within Pinellas County. Said transmission lines were to be utilized and are being utilized at the present time to receive water from the County's Cypress Creek Wellfield and the County's Cross Bar Ranch Wellfield located in Pasco County.

5. All defendants knew or should have known that said pipelines were to be the most critical transmission line in the entire

Pinellas County Water System which, after construction, could not be taken out of service except under extreme unusual conditions and for short periods of time during the rainy season or the winter months. So critical is the utilization of said transmission lines that without their existence or should their use be disrupted for any reasonable period of time, a water emergency or water crisis would have to be declared in Pinellas County which would result in water rationing.

6. As a result of the need for said transmission lines, the plaintiff, PINELLAS COUNTY, contracted in Pinellas County with the following named defendants for the following indicated services for the design, creation of specifications, manufacture and installation of said transmission lines:

(A) To defendant, INTERPACE CORPORATION, a contract for the manufacture of the 60-inch diameter and 54-inch diameter transmission pipe sections which were to be installed into the transmission pipelines, said contract being executed on the 25th day of February, 1977, wherein the defendant, INTERPACE CORPORATION, was to supply through its Lock Joint Products Division pipeline sections for construction of the pipelines. A copy of the material portions of the contract documents is attached to this complaint together with the appropriate bid and bidding information accepted by the defendant, INTERPACE CORPORATION, as plaintiff's Exhibit A.

(B) To defendant, CH2M HILL SOUTHEAST, INC., who was known by the name of Black, Crow & Eidsness, Inc. at the time of the execution of a contract dated the 24th day of March, 1975, between PINELLAS COUNTY and Black, Crow & Eidsness, Inc. for Black, Crow & Eidsness, Inc. to act as the County's consulting engineers wherein Black, Crow & Eidsness, Inc. was to provide, among other duties, route selection survey, selection of the choice of materials to be specified for the component parts of the pipeline, the investigation of the above-ground and below-ground chemical, physical, soil, groundwater, and electrical conditions and their potential effects on the materials selected for the component parts of the pipeline, to provide the final design and construction plans and specifications for the project, provide consultation and advise as to the necessity of providing or obtaining other services such as laboratory testing and inspection of samples or materials and special consultations, and to provide construction supervision such as

visiting the construction site on an average of four (4) times per month to protect the owner against defects and deficiencies in the work of the contractor, and to check shop drawings and descriptive data as to the general conformity to the plans and specifications of the project, and to require special examination or testing of the work and recommend final acceptance of the work. A copy of said contract is attached to this complaint as plaintiff's Exhibit B.

(C) To BUMBY AND STIMPSON, INC., a contract dated the 15th day of March, 1977, for the installation of the pipeline and appurtenances necessary for the complete operation of the facility. A copy of the material portion of the contract is attached to this complaint as plaintiff's Exhibit C.

(D) To SUWANNEE TRANSFER, INC., a subcontract from BUMBY AND STIMPSON, INC. for the delivery of the pipe from the manufacturer to the construction site of the pipelines. Plaintiff does not have a copy of the subcontract but alleges that the original is in the possession of said defendant.

7. Thereafter, the defendant, INTERPACE CORPORATION, through its Lock Joint Products Division, pursuant to the plans and specifications designed and written by the defendant, CH2M HILL SOUTHEAST, INC., as more particularly described in plaintiff's Exhibit A, commenced construction of the pipe sections, fittings and other specials which, when fitted together, would constitute the 60-inch diameter and 54-inch diameter pipelines.

8. Throughout the period from approximately the 25th day of February, 1977, to the 2nd day of October, 1978, the defendant, INTERPACE CORPORATION, designed and manufactured sections of the 60-inch diameter and 54-inch diameter pipes, pipe fittings and specials, which were delivered to the respective construction areas and installed in the ground by the defendant, BUMBY AND STIMPSON, INC. The said 60-inch diameter pipeline, when completed, consisted of approximately 12 miles of pipeline or 63,400 feet of pipe. The 54-inch diameter pipeline consists of approximately 1.5 miles of pipeline or 8,160 feet of pipe.

9. The additional importance of the 54-inch diameter pipeline is that it commences at the Pasco County line and runs near the S.K. Keller Pumping Station. It is accompanied in parallel fashion by a 42-inch diameter pipeline both of which empty into the 60-inch diameter pipeline described herein near the S.K. Keller Pumping Station. The 42-inch diameter pipeline and the 54-inch

diameter pipeline serve to bring all of the needed potable water for human consumption to PINELLAS COUNTY from neighboring Pasco County to the North.

10. On the 2nd day of October, 1978, the 60-inch diameter pipeline was completed and put into service and on the 2nd day of October, 1978, the 54-inch diameter pipeline was completed and placed into service.

11. Thereafter, the plaintiff, PINELLAS COUNTY, utilized the 60-inch diameter pipeline and the 54-inch diameter pipeline for the supply of potable water to its retail and wholesale customers of the Pinellas County Water System. On November 13, 1979, in the area of a community known as East Lake Woodlands, a section of the 60-inch diameter pipeline exploded and ruptured causing the opening of a gigantic hole in the area of the pipeline rendering a section of the 60-inch diameter pipeline totally unusable. As the result of this pipeline failure, the plaintiff, PINELLAS COUNTY, embarked upon an extensive investigation to determine the cause of the pipeline failure.

12. Thereafter, commencing on the 19th day of November, 1979, the plaintiff, through its consulting engineers, Jones, Edmunds and Associates, Inc., have conducted an extensive investigation into the design and manufacture and installation of both the 60-inch diameter and 54-inch diameter transmission lines. This inspection resulted in the additional finding of sections of pipelines which were faulty in design, failed to meet specifications for the construction of the pipeline, were the result of faulty manufacturing techniques, all of which have resulted in the determination by the plaintiff that both the 60-inch diameter and 54-inch diameter transmission lines are undependable and riddled with defective pipe, which will result in periodic and frequent failures of numerous and various sections of pipeline in the future to the point that said pipeline needs to be totally replaced at a cost in excess of Sixteen Million Dollars.

13. The defendant, INTERPACE CORPORATION, carelessly and negligently designed, manufactured and produced the 60-inch diameter and 54-inch diameter pipes, pipe fittings and specials and negligently and carelessly fell below the standards commensurate in the industry for the design and manufacture of pipes, pipe fittings and specials in the following respects:

(A) The material parameters used in the design of the pipes were different from and superior to the characteristics of the materials used to fabricate the pipe or, in other words, the materials utilized in the manufacture of the pipe did not meet the design assumptions in that:

(1) The modulus of elasticity of the concrete at the time the pipes were prestressed was less than that assumed in the design;

(2) The final modulus of elasticity of the concrete used in the design to calculate the creep loss in the concrete was higher than the final modulus of elasticity of the concrete used in the fabrication of the pipe;

(3) The combined modulus of elasticity of the steel cylinder and prestressed wires used in the fabrication of the pipe was higher than the combined modulus assumed in the design; and

(4) The creep of the concrete used in the fabrication of the pipe exceeded the concrete creep assumed in the design of the pipe.

As a direct and proximate result of the use of the incorrect parameters in the design, the defendant, INTERPACE CORPORATION, provided to the plaintiff, PINELLAS COUNTY, pipe which was lower in strength, lower in working pressure, and had less safety factor than represented by the manufacturer, INTERPACE CORPORATION, and required by the specifications for the manufacture of the pipe as specified in plaintiff's Exhibit A.

(B) The concrete materials used in the fabrication of the pipe did not meet the specification requirements as contained in plaintiff's Exhibit A in that:

(1) The fine aggregate incorporated in the concrete core and the mortar coating over the prestressed wires was more finely graded than permitted by the specification limits (AWWA-301-72);

(2) The coarse aggregate incorporated in the concrete contained deleterious substances in the form of minus 200 mesh sieve material, soft particles, clay lumps, and the combination thereof; and

(3) Chemical admixtures were used in the concrete without the permission or knowledge of the purchaser, PINELLAS COUNTY, as required by the specifications. The type

of admixture and quantity used was changed without notifying the purchaser, PINELLAS COUNTY.

As a direct and proximate result of the carelessness and negligence of the defendant, INTERPACE CORPORATION, as hereinabove alleged, through the use of nonconforming materials, the concrete used in the fabrication of the pipe did not possess the qualities deemed essential and required by the specifications to insure adequate performance and durability of the pipe. The use of the admixtures to attempt to compensate for the deficiencies of the materials and procedures used was hidden from the purchaser, PINELLAS COUNTY, contrary to the requirements of the contract between the plaintiff, PINELLAS COUNTY, and the defendant, INTERPACE CORPORATION.

(C) The quality of the prestressing wire used to fabricate the pipe did not meet the requirements of the project specifications as contained in plaintiff's Exhibit A. Prestressing wire generally used throughout manufacture of the pipe was of a strength and quality not recognized or recommended by any national standards, organization or published specification. Said prestressing wire was manufactured and used solely to obtain a cost advantage over competitors. The wire, however, was overdrawn and was grossly defective in that it was susceptible to stress corrosion, resulting in embrittlement, splitting, pitting, and failure in the environment in which it was known that it was going to be exposed and placed into service. Consequently, the safety factor against failure is being continuously reduced rendering the pipeline unreliable and a hazard to the community and surrounding areas where it is located.

(D) The procedures used to manufacture the pipe were not in accordance with the requirements of the specifications contained in plaintiff's Exhibit A in that:

(1) Pipe cores were not cured as specified in the AWWA C301-72 standard. Cores were "tipped" from their bases and removed to a storage yard prior to 32 hours age. Water spraying was haphazard and only portions of the cores were kept moist for the required curing period;

(2) Water curing of the mortar coating was not maintained for four (4) days as required by the specifications (AWWA C301-72). Pipes were prematurely removed from curing and stored in an open yard subject to drying and shrinkage;

(3) The minimum clear distance between prestress wires was not maintained at all times resulting in adjacent wires touching which created voids which could not be filled with protective slurry or mortar;

(4) Defective concrete and mortar were not removed to the extent necessary to ensure the quality of the pipe;

(5) Repairs were made to the pipe using materials having different constituents, consistencies, and qualities from those required by the specifications contained in plaintiff's Exhibit A; and

(6) Work was not performed in a workmanlike manner by properly trained employees and mechanics skilled in their trade.

As a direct and proximate result of the carelessness and negligence of the defendant, INTERPACE CORPORATION, as hereinabove alleged, and because of the deficiencies hereinabove alleged, the concrete and pipe produced were of variable and uncertain quality resulting in imperfections and weak areas in unknown locations subject to deterioration, excessive stresses, and reduced safety factors.

(E) The equipment used to fabricate the pipe was not properly maintained or prepared for use. In addition, the defendant was careless and negligent in that:

(1) Welding rods used to fabricate the steel cylinders were not maintained in adequately heated dry storage as recommended by the rod manufacturer to ensure satisfactory welds;

(2) Molds were not thoroughly cleaned before each use as required by the specification resulting in imperfect concrete surfaces with numerous voids;

(3) Molds were not properly assembled and sealed which produced cores that have irregularities and offsets in the surface at the mold gates, variable wall thickness, thin on one side and eccentrically positioned cylinders within the core, resulting in stresses within the pipe greater than those for which it was designed;

(4) Application of the cement slurry prior to coating the prestress wire was erratic resulting in areas of unknown location throughout the pipeline which are highly susceptible to corrosion of the prestress wires and subsequent reduc-

tion in the safety factor of the pipeline and possible ultimate failure.

As a direct and proximate result of the carelessness and negligence of the defendant, INTERPACE CORPORATION, as hereinabove alleged, and as a consequence of the above-described deficiencies, the pipeline was supplied with less strength, capacity, and durability than required by the specifications as contained in plaintiff's Exhibit A.

(F) The quality control exercised during production of the pipe was inadequate to ensure pipes were produced in accordance with the specification requirements. As a result of these actions, the defendant was careless and negligent in the following additional respects:

(1) The personnel conducting the quality control tests required by the specifications were not qualified or adequately trained;

(2) The quality control tests performed were not made in accordance with the ASTM methods cited in the specifications as required by plaintiff's Exhibit A;

(3) Inadequate personnel were employed to assure product conformance with the specifications in all respects; and

(4) The quality control program used was inadequate to ensure that pipes conforming to the specifications or that pipes undamaged during the manufacturing process were supplied.

As a direct and proximate result of the carelessness and negligence of the defendant, INTERPACE CORPORATION, as hereinabove described, the above-described deficiencies resulted in numerous pipes being supplied which did not conform to the specification requirements and had imperfections making them susceptible to deterioration and corrosion of the prestressed wires leading ultimately to failure.

(G) The field repairs conducted by the defendant, INTERPACE CORPORATION, of damaged pipe were made under the supervision of the manufacturer's representative and were not adequate to prevent corrosion of the prestress wire.

14. Properly manufactured pipe which was to be delivered by the defendant, INTERPACE CORPORATION, to the plaintiff, PINELLAS COUNTY, would be expected to last for a minimum of

80 years and in fact, depending upon conditions, if properly designed and manufactured, almost indefinitely. The pipe and as a result the pipelines, namely the 60-inch diameter and 54-inch diameter transmission lines, designed and manufactured by the defendant are inherently defective with defects as hereinabove alleged which were latent and undiscoverable by the plaintiff, PINELLAS COUNTY, unless the pipe itself was inspected through destruction of the pipe thus rendering it useless for service in the pipeline. As the result of the construction, design, and manufacture of the above-described latent defects, the plaintiff, PINELLAS COUNTY, was unaware of the existence of said latent defects until, through its lengthy and scientific investigation, the determination and existence of said latent defects in its transmission lines became known to the plaintiff on September 3, 1980, when at said time, the plaintiff placed the defendant, INTERPACE CORPORATION, on notice of its responsibilities for furnishing the plaintiff defective pipelines. Said latent defects were not discoverable through reasonable diligence of the plaintiff, PINELLAS COUNTY, until said date because said latent defects could only be discovered by destruction of the pipe itself. As hereinabove alleged, the pipeline is an indispensable and main artery of the Pinellas County Water System and cannot be taken out of service for any substantial length of time which resulted in the plaintiff being required to only periodically examine sections of the pipeline during the rainy season when service could be temporarily interrupted through said pipelines.

15. On or about July 2, 1981, defendant, GHA LOCK JOINT, INC., a wholly owned subsidiary of Gifford Hill American, Inc., purchased the domestic assets of Lock Joint Products Division of INTERPACE CORPORATION. During the prepurchase evaluation of the Lock Joint Division of Interpace, Gifford Hill American, Inc. became aware of pipe failure problems experienced by Interpace customers. As a result, defendant, GHA LOCK JOINT, INC., through contractual obligations with the defendant, INTERPACE CORPORATION, assumed the first $200,000.00 of expense where there were individual Interpace pipe breaks due to the fault of the pipe and on Interpace pipeline sections which were determined to be in need of replacement due to the fault of the pipe. The plaintiff, PINELLAS COUNTY, alleges the existence of said contractual obligation and the assumption by the defendant, GHA LOCK JOINT, INC., of said liability but does not have a copy of

said contract and alleges that the contract is in the possession of the defendant, GHA LOCK JOINT, INC., and defendant, INTERPACE CORPORATION. In the alternative, the plaintiff alleges that GHA LOCK JOINT, INC. contractually assumed the entire responsibility for any defective pipe produced by INTERPACE CORPORATION through its purchase of the Lock Joint Division of defendant, INTERPACE CORPORATION. As a direct result of said assumption of liability, the defendant, GHA LOCK JOINT, INC., is liable to the plaintiff, PINELLAS COUNTY, in the sum of $200,000.00 or in the alternative for all damages claimed by the plaintiff herein.

16. As a direct and proximate result of the carelessness and negligence of the defendants, INTERPACE CORPORATION and GHA LOCK JOINT, INC., as hereinabove alleged, the plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars in that the plaintiff, PINELLAS COUNTY, will be required to replace the entire 60-inch diameter and 54-inch diameter transmission lines, will be required in the replacement of said lines to design, acquire and provide to its Water System all materials needed for the construction of said pipeline, which includes but is not limited to supervision and inspection of manufacturing, acquiring materials, including new valves and new appurtenances, the acquisition of new rights-of-way, and the acquisition of temporary construction easements. In addition thereto, the plaintiff has been damaged in that it has been required to incur expenses in costs of inspection and testing of its pipeline to determine the existence of the defects and has been required to hire the services of consulting engineers for said purposes together with other experts *all* of which damages exceed the sum of Sixteen Million Dollars.

...

COUNT V
NEGLIGENCE AGAINST CH2M HILL SOUTHEAST, INC.

Plaintiff, PINELLAS COUNTY, by its undersigned attorney, sues the defendant, CH2M HILL SOUTHEAST, INC., and avers:

35. Plaintiff, PINELLAS COUNTY, realleges and reavers its allegations contained in paragraphs 1 through 16, Count I, above.

36. At all times material to this complaint, defendant,

CH2M HILL SOUTHEAST, INC., is a Florida corporation formerly known as Black, Crow and Eidsness, Inc. who changed its corporate name to CH2M HILL SOUTHEAST, INC. and who is an engineering company organized and existing under the laws of the State of Florida.

37. The defendant, CH2M HILL SOUTHEAST, INC., in consideration of the payment of $292,211.16, which was 4.5% of the total estimated construction costs of the project, provided final design plans and specifications pursuant to and under the terms of the contract between PINELLAS COUNTY and defendant, plaintiff's Exhibit B. In addition, the defendant provided construction supervision for an additional compensation of $72,728.11 which represents 1.12% of the estimated construction costs.

38. The defendant, CH2M HILL SOUTHEAST, INC., carelessly and negligently performed its duties owed to the plaintiff, PINELLAS COUNTY, under their contract, plaintiff's Exhibit B, in the following manner:

(A) Failed to properly direct, to perform, or to have performed soil survey investigations including, but not limited to, soil resistance to the flow of electric current, total soil acidity, soil drainage (groundwater fluctuation), soil texture, soil microbial activity, and soil chemistry. Failed to properly direct, to perform, or to have performed a corrosion testing program to determine the effects of the aforementioned local soil corrosion conditions on the rate of corrosion of prestressed steel wire embedded in mortar. As a direct result of such failure, the pipeline has been exposed to detrimental soil and groundwater conditions resulting in, but not limited to, a deterioration of and damage to the pipe mortar coating and the prestressed wire.

(B) Failed to properly direct, to perform, or to have performed investigations of the pipeline root for stray electrical currents, low soil resistivities, and aggressive soil and groundwater conditions and failed to design the pipeline to prevent damage by electrolytic currents and stray electrical currents. As a result, electrolytic currents and stray electrical currents have produced damages in, but not limited to, pipeline prestressed wires.

(C) Failed to properly prepare and review specifications for pipe manufacture by approving pipe manufactured with "Class IV" wire when, in fact, there were no recognized specifications which existed providing for such wire and by approving pipe

designed with inadequate safety factors;

(D) Failed to specify, to perform, or to have performed, sufficient inspection of materials used in the manufacture of pipe to insure the pipe would be manufactured and delivered as required by the specifications. As a result, materials were used in the manufacture of the pipe which did not meet specification requirements;

(E) Failed to specify, to direct, to perform, or to have performed, adequate quality control tests on the manufactured pipe which negligence included, but is not limited to, failure to detect that the pipe was being manufactured with materials which did not meet the design assumptions or the project specifications, failure to detect that the pipe was being manufactured with embrittled wire, that molds or forms were not correctly aligned during concrete pouring operations resulting in the cores of the pipes not meeting specified thicknesses, thereby causing stresses within the pipe greater than those for which it was designed, and failure to detect that the mortar coating did not, in all cases, meet specified minimum thickness and composition requirements, and failure to detect that the mortar coating was being damaged and was separating during the manufacturing operation, and failure to detect that application of the cement slurry prior to coating the prestress wire was erratic resulting in areas of unknown location throughout the pipeline which are highly susceptible to corrosion of the prestress wires and subsequent reduction of the line and possible ultimate failure;

(F) Failed to specify acceptance inspection procedures adequate to identify defective pipe. In addition thereto, the defendant failed to properly inspect the work, failed to identify incorrect pipe loading and unloading techniques, on the job pipe handling, and pipe installation procedures which resulted in damage to the pipe; and

(G) Failed to require proper repairs to pipe damaged during transportation or installation.

39. As a direct and proximate result of the negligence of the defendant, CH2M HILL SOUTHEAST, INC., the plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars as more particularly described in paragraph 16.

WHEREFORE, the plaintiff, PINELLAS COUNTY, sues the defendant, CH2M HILL SOUTHEAST, INC., for damages in a sum in excess of Sixteen Million Dollars plus prejudgment interest and costs of this action.

COUNT VI
BREACH OF CONTRACT OF CH2M HILL SOUTHEAST, INC.

40. The plaintiff, PINELLAS COUNTY, realleges and reavers paragraphs 1 through 16, Count I, above.

41. The plaintiff, PINELLAS COUNTY, realleges and reavers paragraphs 36 through 39, inclusive, COUNT V, above.

42. The defendant, CH2M HILL SOUTHEAST, INC., breached its contract with the plaintiff, PINELLAS COUNTY, in the manner described in paragraph 37.

43. The plaintiff, PINELLAS COUNTY, has performed all conditions precedent required under the contract, plaintiff's Exhibit B.

44. As a direct and proximate result of the breach of contract by the defendant, CH2M HILL SOUTHEAST, INC., the plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars as more particularly described in paragraph 16.

WHEREFORE, the plaintiff, PINELLAS COUNTY, sues the defendant, CH2M HILL SOUTHEAST, INC., for damages in a sum in excess of Sixteen Million Dollars plus prejudgment interest and costs of this action.

AGREEMENT

BETWEEN

BLACK, CROW & EIDSNESS, INC.
CONSULTING ENGINEERS

AND

BOARD OF COUNTY COMMISSIONERS
PINELLAS COUNTY, FLORIDA

AGREEMENT

THIS AGREEMENT, made and entered into by and between Pinellas County, a political subdivision of the State of Florida, hereinafter called the "Owner," and BLACK, CROW AND EIDSNESS, INC., a nationally known and recognized engineering firm, a corporation chartered and existing under the laws of the State of Florida, hereinafter called the "Consulting Engineers," on the date appearing on the last page hereof

WITNESSETH:

That for and in consideration of the covenants and promises to be carried out by each party herein, it is agreed by and between the parties hereto as follows:

WHEREAS, the Owner contemplates the need for improvements to its water system;

WHEREAS, the Consulting Engineers are staffed with qualified engineering personnel versed in the field(s) of Environmental Engineering as well as other fields of municipal engineering; and

WHEREAS, the Owner has need for the services of the Consulting Engineers in connection with sixty inch water transmission main as described in the Ten Year Master Plan (Project 271-71-51), revised August, 1973, as well as other services of the Consulting Engineers from time to time for reports, design, professional services during construction and/or consultation;

NOW, THEREFORE, the Owner does hereby employ said Consulting Engineers to perform engineering services in connection with sixty inch water transmission main as described in the Ten Year Master Plan (Project 271-71-51), revised August, 1973.

The Consulting Engineers agree to make a route selection survey considering at least three (3) separate routes, preliminary design, final design plans and specifications for the project known as Sixty Inch Water Transmission Main as described in the Ten Year Master Plan (Project 271-71-51), revised August, 1973.

These services to include the following.

ITEM A - DESIGN IMPROVEMENTS

Upon receipt of specific written authorization by the Owner to the Consulting Engineers for the design of such improvements as may be designated, the Consulting Engineers will, with reasonable diligence, design authorized improvements specifically as follows:

1. Provide consultation and advise as to the necessity of providing or obtaining other services such as property, boundary, right-of-way, topographic and utility surveys, core borings, probings or subsurface explorations, hydrographic surveys, laboratory testing and inspection of samples or materials, or special consultation, and act as the Owner's representative in connection with any such services.

2. Prepare complete bases of design, together with statements of allowances, assumptions, and factors in order that the Owner may secure approval of such governmental authorities as have jurisdiction over design criteria applicable to the project.

3. Prepare and furnish contract drawings, contract forms (subject to the approval of the Owner's attorney), specifications, schedules of quantities, and detailed estimates of cost of the proposed improvements. The detailed plans and specifications will be made available to the Owner in 5 copies. Additional copies will be furnished to the Owner if requested, at the cost of reproduction plus reasonable handling charges.

4. Confer with officials of state or federal agencies having jurisdiction during the preparation of the plans and specifications, and assist the Owner in obtaining approval of the same.

5. Place copies of the plans and specifications on view in the Consulting Engineers' office and in offices of several certified builders' exchanges, and advise prospective bidders, suppliers of construction materials, and equipment manufacturers.

6. Attend bid openings and assist the Owner in tabulating and canvassing construction proposals, and make engineering recommendations in awarding of construction contract or contracts.

It is specifically understood that the services to be furnished under DESIGN OF IMPROVEMENTS do not include property, boundary and right-of-way surveys, or the makings of borings or soil bearing tests.

ITEM B - PROFESSIONAL SERVICES DURING CONSTRUCTION

Upon receipt of specific written authorization by the Owner, following the award of the construction contract for the proposed program of improvements, or undertaking the construction of these improvements by the Owner's forces, the Consulting Engineers will perform the following professional services during construction:

1. An average of 4 visits per month to the construction site during construction to determine if the work is proceeding in accordance with the Contract Documents. By means of these visits the Consulting Engineers will endeavor to protect the Owner against defects and deficiencies in the work of the contractor. This shall not imply guarantee of the contractor's performance.

2. Check shop drawings and descriptive data submitted by the contractor as to general conformity to the plans and specifications.

3. Approval of pay estimates.

4. Consult and advise with the Owner, act as the Owner's representative, issue all instructions of the Owner to the contractor, prepare routine change orders as required and act as interpreter of the terms and conditions of the Contract Documents and judge the performance thereunder. Whenever the Consulting Engineers consider it necessary or advisable to effect proper carrying out of the intent of the Contract Documents, they may, as the Owner's representative, direct the contractor to stop work or require special examination or testing of the work.

5. Prepare and submit routine proposed contract change orders. For purposes of this agreement the term "routine change order" is defined as a change not substantially altering the scope of work.

6. Following a final inspection with the Owner's representatives, representatives of any governmental agencies having jurisdiction, and representatives of the contractor, recommend as to final acceptance of the construction work.

7. Furnish 2 sets of complete prints for each construction contract, showing changes made during the construction process based on information furnished by the construction contractor to the Consulting Engineers.

It is specifically understood that the services to be furnished under PROFESSIONAL SERVICES DURING CONSTRUCTION do not include the testing of materials or the furnishing of resident project representatives, field engineers, and inspection personnel.

ITEM C - RESIDENT PROJECT REPRESENTATION

The Consulting Engineers shall, if authorized by the Owner, furnish the services of a resident engineer and inspectors as required to observe the construction work of the contractor on a daily basis. The said observation of construction shall include field observation field inspection of materials and work, preparation of

details for the prosecution of the work, preparation of daily progress reports, monthly summaries, and the review and verification of all partial and final estimates for payments to contractors. Monthly progress reports shall include the critical path method of reporting.

Through on-site observations of the work and progress, and field checks of materials and equipment by the resident engineer and inspectors, the Consulting Engineers will endeavor to provide for the protection of the Owner against defects and deficiencies in the work, but the furnishing of such resident engineers and inspectors shall not make the Consulting Engineers responsible for the contractor's failure to perform the construction work in accordance with the Contract Documents.

ITEM D - SUPPLEMENTARY SERVICES

If authorized in writing by the Owner, the Consulting Engineers will furnish or obtain from others additional services of the following types:

1. Furnishing property, photogrammetric, boundary, right-of-way, profiles, cross sections, horizontal and vertical surveys, topographic and utility surveys and hydrographic surveys.

2. Soils, foundation and materials engineering services including borings, probings or subsurface explorations, laboratory testing and inspection of samples of materials and other special consultation.

3. Biological consultations, bioassays, ecological impact evaluations and related environmental services.

4. Making drawings from field measurements of existing construction when required for planning additions or alterations thereto.

5. Additional services due to significant changes in general scope of the project or its design including, but not limited to, changes in size, complexity or character of construction.

6. Revising previously approved studies, reports, design documents, drawings or specifications.

7. Preparing documents for alternate bids requested by the Owner for work which is not executed.

8. Preparing detailed renderings, exhibits or scale models for project.

9. Furnishing additional copies of reports and additional prints of drawings and specifications.

10. Investigations involving detailed consideration of operation, maintenance and overhead expenses; and the preparation of rate schedules, earnings and expense statements, feasibility studies, appraisals and valuations; detailed quantity surveys of material and labor; and material audits or inventories required for certification of force account construction performed by the Owner.

11. Additional or extended services during construction made necessary by (1) work damaged by fire or other cause during construction; (2) prolongation of the construction contract time by more than twenty percent (20%); (3) acceleration of the work progress involving services beyond normal working hours; and (4) contract default due to delinquency or insolvency.

12. Additional services and costs necessitated by out-of-town travel required of the Consulting Engineers other than visits to the project as required by this Agreement.

13. Serving as expert witness for the Owner in any litigation or other proceeding involving the project.

14. Additional services in connection with the project not otherwise provided for in this Agreement.

ITEM E - THE OWNER'S RESPONSIBILITIES

It is understood the Owner will:

1. Provide full information as to its requirements for the project.

2. Assist the Consulting Engineers by placing at their disposal all available information pertinent to the site of the project, including previous reports and any other data relative to design and construction of the project.

3. Designate a person or persons in writing to serve as the Owner's representative with respect to the work to be performed under this Agreement.

4. Guarantee access to and make all provisions for the Consulting Engineers to enter upon public and private lands as required for the Consulting Engineers to perform their work under this Agreement.

5. Examine studies, reports, sketches, estimates, specifications, drawings, proposals, and other documents presented by the Consulting Engineers and render decisions in writing pertaining thereto within a reasonable time so as not to delay the services of the Consulting Engineers.

6. Advertise for proposals from bidders, open the proposals at the appointed time and place, and pay for all costs incidental thereto.

7. Provide such legal, accounting and insurance counseling services as may be required for the project.

8. Give prompt written notice to the Consulting Engineers whenever the Owner observes, or otherwise becomes aware of, any defect in the project.

9. Obtain approval of all governmental authorities having jurisdiction over the project and such approvals and consents from such other individuals or bodies as may be necessary for completion of the project.

10. Obtain all properties, easements and rights-of-way necessary for the work.

11. Furnish or direct the Consulting Engineers to provide at the Owner's expense, necessary SUPPLEMENTARY SERVICES.

TEM F - FEES AND PAYMENTS

1. For the route selection survey and those services enumerated under Item A, Design of Improvements, and Item B, Professional Services During Construction, the Owner agrees to pay and the Consulting Engineers agree to accept as full compensation thereof, fees equal to 5.62% of the construction cost.

Construction cost is defined as the actual cost of the work, exclusive of land and right-of-way, engineering inspection, and Owner's overhead.

The Owner may make progress payments in accordance with the A.S.C.E. manual, Reports of Engineering Practice No. 45, 1972. However, a payment of 80% of the total engineering fee shall be due and payable upon completion and submission of final plans and specifications, based upon a detailed construction cost estimate to be submitted with said final plans and specifications, with the understanding that any fees so paid, as computed from the detail estimated cost, will be adjusted to the actual construction costs as these become known. If the Owner deletes a portion of the work from the project after the design of the portion has been completed by the Consulting Engineers, then the fee shall be 4.50 percent of the detailed construction estimate for such portion. If the construction work

does not proceed within a period of twenty-four (24) months after the submission of the detailed plans and specifications to the Owner, then the final fee for design services shall be 4.50 percent of the detailed estimated cost.

Upon submission of the plans and specifications to the Owner, and upon their acceptance, should any revision to change the nature or scope of the work be necessary, the Consulting Engineers shall be compensated for making such alterations and additions to the detailed plans and specifications as authorized by the Owner, said compensation being on a Cost-Plus basis as hereinafter defined.

2. The balance of the fee shall be for Item B, Professional Services During Construction, and shall be paid monthly in proportion to the value of work completed.

3. For services of RESIDENT PROJECT REPRESENTATION (Item C) and inspection, which are authorized, the Owner agrees to pay and the Consulting Engineers agree to accept as full compensation for the furnishing of resident inspection an amount payable monthly equal to the payroll or salary cost of such resident engineer and inspector or inspectors, times a factor of 2.0 to provide general overhead and profit, plus transportation costs of $0.18 per mile. The Owner shall have the right to review and approve the qualifications and salary costs paid to the resident engineers and inspectors.

4. Payment for SUPPLEMENTARY SERVICES (Item D) shall be paid monthly upon presentation of the Consulting Engineer's detailed statement as follows:

Where supplementary services are of a nature so as to be performed by personnel assigned to established offices of the Consulting Engineers, the Consulting Engineers will receive compensation on a Cost-Plus basis as hereinafter defined.

ITEM G - DEFINITIONS

1. Cost-Plus is defined as payroll or salary cost plus one hundred and fifty percent (150%) plus reimbursable expenses.

2. Payroll or salary cost shall be defined by the ASCE - Manuals and Reports on Engineering Practice - No. 45, 1972, as follows:

> *Salary cost is defined as the cost of salaries (including sick leave, vacation, and holiday pay applicable thereto) of engineers, technicians, draftsmen, stenographers, surveymen, clerks, etc., for time directly chargeable to the project plus unemployment, excise, and payroll taxes, and contributions for social security, employment compensation insurance, retirement benefits, and medical insurance benefits.*

3. Reimbursable expenses shall mean the actual expense of transportation and subsistence of principals and employees when traveling in connection with the project, toll telephone calls and telegrams, reproduction of reports, drawings and specifications, and similar project related items, plus 15% to provide for applicable general overhead. Reimbursable expenses with respect to automobile travel by company or personnel-owned vehicles shall be charged at the rate of $0.18 per mile.

ITEM H - GENERAL CONSIDERATIONS

1. *Ownership of Documents*

All documents, including original drawings, estimates, specifications, field notes and data, shall be the property of the Owner. The Owner shall have the right to reuse the same for extensions of this project of this project or for

new projects, without the written permission of the Consulting Engineers and without paying any further compensation to said Consulting Engineers. Any reuse without specific written verification or adaptation by the Consulting Engineers will be at the Owner's sole risk and without liability or legal exposure to the Consulting Engineers.

2. *Estimates*

The Consulting Engineers have no control over the cost of labor and materials, or over competitive bidding and market conditions, and the estimates of construction cost provided for herein are made on the basis of their experience and qualifications. The Consulting Engineers do not guarantee the accuracy of such estimates as compared to the contractor's bids or the project construction cost.

3. *Work by the Owner's Forces*

In the event the Owner elects to construct a portion or portions of the improvements planned by the Consulting Engineers with the Owner's own forces, the total construction cost to be used in determining the Consulting Engineer's compensation under Item F shall be provided under Item F, Paragraph 1, together with the Consulting Engineers' estimate for the portion(s) of the work done by the Owner's forces.

The Owner reserves the right to have qualified county personnel perform engineering services under Items C and D on this project without compensating the Consulting Engineers for these services where the Owner has given written notice to the Consulting Engineers prior to the Consulting Engineers rendering such services.

4. *Insurance*

The Consulting Engineers shall secure and maintain coverage as will protect them from claims under the Workmen's Compensation Act and from claims for bodily

injury, death, or property damage which may arise from the performance of their services under this Agreement.

5. *Successors and Assigns*

The Owner and the Consulting Engineers each binds himself and his partners, administrators and assigns to the other party of this Agreement and to the partners, successors, executors, administrators, and assigns of such other party, in respect to all covenants of this Agreement. Except as above, neither the Owner nor the Consulting Engineers shall assign, sublet or transfer his interest in this Agreement without the written consent of the other. Nothing herein shall be construed as creating any personal liability on the part of any officer or agent of any public body which may be a party hereto.

7. *Termination of Contract*

This Agreement may be terminated at any time by either party hereto. Written notice of intent to terminate shall be given by either party hereto to the other party at least 30 days prior to the date of final termination. In the event of such termination, the Consulting Engineers shall be fully compensated under the provisions of this Agreement for all work performed and services rendered prior to the date of final termination.

8. *Contingent Fees*

The Consulting Engineers warrant that they have not employed or retained any company or person, other than a bona fide employee working solely for the Consulting Engineers, to solicit or secure this Agreement, and that they have not paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working solely for the Consulting Engineers, any fee, commission, percentage, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement.

9. *Transportation Costs*

The Owner shall not reimburse the Consulting Engineers for the cost of transportation outside Pinellas County except where such travel is authorized by the Owner under Supplementary Services.

10. *Project Coordinator*

The Consulting Engineers shall provide, at no additional cost to the Owner, a project coordinator who shall coordinate all phases of the engineering services to be performed herein, including supplementary services.

ITEM K - EXECUTION

IN WITNESS WHEREOF, the Owner has caused this instrument to be executed on behalf of its proper officers of the Board of County Commissioners, their seal hereunto affixed and attested by witnesses whose names are subscribed opposite each respective signature, and the Consulting Engineers have caused this instrument to be executed in their names by their duly authorized officers and under corporate seals affixed this 24th day of March, 1975.

Owner:
BOARD OF COUNTY
COMMISSIONERS
PINELLAS COUNTY,
FLORIDA

ATTEST: HAROLD MULLENDORE,
CLERK

_____ By_____
Title Chairman

By _____

Consulting Engineers:
BLACK, CROW AND
EIDSNESS, INC.

ATTEST

_____ By_____

Corporate Secretary Title Vice President

APPROVED AS TO FORM AND
CORRECTNESS

APPROVED AS TO
FORM AND CON
TENT:

_____ _____

Owner's Attorney Black, Crow and
Eidsness, Inc. - Counsel

APPENDIX I

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA
CASE NO. 83-13313-12

PINELLAS COUNTY, FLORIDA

Plaintiff,

vs.

INTERPACE CORP.; GHA LOCK JOINT, INC.; CH2M HILL SOUTHEAST, INC.; BUMBY & STIMPSON, INC. and SUNSHINE TRANSFER, INC.,

Defendants.

_____/

MOTION TO DISMISS COUNTS V AND VI OF COMPLAINT

COMES NOW the Defendant, CH2M HILL SOUTHEAST, INC., hereinafter referred to as "CH2M HILL", by and through its undersigned attorneys, and files this, its Motion to Dismiss Counts V and VI of the Complaint of Pinellas County, Florida, a political subdivision of the State of Florida, hereinafter referred to as "PINELLAS COUNTY", and says:

1. Count V of Plaintiff's Complaint alleges CH2M HILL carelessly and negligently performed duties allegedly owed Plaintiff. PINELLAS COUNTY has failed to allege sufficient ultimate facts establishing the existence of a cause of action for negligence.

2. In order to establish the existence of a cause of action for negligence, Plaintiff must show the existence of a duty to protect Plaintiff, a subsequent breach of that duty, and injuries sustained as a proximate result of the breach. *Clark v. Boeing Company*, 395 So.2d 1226 (Fla. 2d DCA 1981); *Blackton Building Supply Company, Inc. v. Garesche*, 383 So.2d 250 (Fla. 5th DCA 1980); *Welsh v. Metropolitan Dade County*, 366 So.2d 518 (Fla. 3d DCA 1979); *Lake Parker Mall,*

ıc. v. Carson, 327 So.2d 121 (Fla. 2d DCA 1976). Plaintiff has failed ɔ allege sufficient ultimate facts establishing the existence of a uty to protect Plaintiff.

3. The contract between CH2M HILL, formerly known as lack, Crow & Eidsness, Inc., and PINELLAS COUNTY, a copy of vhich was attached to the Complaint as Exhibit "B", specifically rovides on page 3 as follows:

> It is specifically understood that the services to be furnished under DESIGN OF IMPROVEMENTS do not include property, boundary and right-of-way surveys, or the making of borings or soil bearing tests.

The contract further provides on page 4:

> It is specifically understood that the services to be furnished under PROFESSIONAL SERVICES DURING CONSTRUCTION do not include the testing of materials or the furnishing of resident project representatives, field engineers, and inspection personnel.

Page 5 of the contract provides that the consulting engineers, CH2M HILL, shall furnish resident project representation only if uthorized and shall furnish the listed supplementary services only f authorized in writing by the Owner. Plaintiff has failed to allege sufficient ultimate facts establishing the existence of any such uthorization to CH2M HILL. Additionally, nowhere in the conract is there a provision that CH2M HILL would supervise the construction.

4. Unless PINELLAS COUNTY can allege the specific contractual duties CH2M HILL was allegedly to perform, PINELLAS COUNTY cannot have a cause of action. The Court in the recent case of *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex. Ct. App. 1982), stated at page 371 the following fundamental proposition:

> The architect's relation to the parties and the work is one specified by the contracting parties in their bargained-for agreement. So long as the contracting parties have freedom to contract as they wish, with respect to the architect's

power and role, *these will vary considerably, and no rule of general application may logically be stated* which is founded simply upon the status of the Defendant as "an architect" *or upon what one believes to be the customary relationship between the work, the architect, the owner, and the contractor;* particularly, a general rule should not be founded upon a presumption that the architect has power over the contractor's performance, in general, or in any particular of the work. (Emphasis supplied).

5. The fundamental proposition of Bernard Johnson has been asserted in Florida through the decision of *Audlane Lumber & Builder's Supply v. D.E. Britt Associates*, 168 So.2d 333 (Fla. 2d DCA 1964); where it is held in a negligence action brought against a supplier of prefabricated wooden trusses and its engineering design firm, that "there is no magic in the generality 'professional service." Id. at 335. The Court stated that the nature and extent of the professional's duty varies in the different circumstances in which the duty arises. Any duties which CH2M HILL owed PINELLAS COUNTY arise out of the contract between the parties and are strictly limited to the terms contained within that agreement. Plaintiff has failed to establish the existence of a duty on CH2M HILL's part to protect PINELLAS COUNTY from the damages which are the subject of the Complaint.

6. Plaintiff alleges in Count VI of its Complaint that Defendant, CH2M HILL, breached its contract with Plaintiff, PINELLAS COUNTY in the manner described in paragraph 38 of its Complaint.

7. In order to recover for breach of contract, Plaintiff must establish the existence of a contract between itself and the Defendant, a subsequent breach of that contract, and that Plaintiff's damages flowed from that breach of contract. *Knowles v. C.I.T. Corp.*, 346 So.2d 1042 (Fla. 1st DCA 1977). Plaintiff has failed to allege sufficient ultimate facts to establish a breach of any of the duties specified in the contract between itself and CH2M HILL.

8. Plaintiff has failed to allege sufficient ultimate facts to show that CH2M HILL failed to follow the standard of care usually exercised by other professional engineers in the same general area and in like circumstances at the time of the design and of the construction of the pipeline.

WHEREFORE, the Defendant, CH2M HILL SOUTHEAST, NC., moves this Court to dismiss Counts V and VI of Plaintiff's omplaint for failure to state a cause of action, and grant efendant such other and further relief as this Court deems proper.

I CERTIFY that copy hereof has been furnished by U.S. Mail his 9th day of December, 1983, to: John T. Allen, Jr., Esquire, 4508 entral Avenue, St. Petersburg, FL 33711, and John D. Shofi, squire, Suite 201, Bayshore Building, 2907 Bay to Bay Blvd., ampa, FL 33609.

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BULL & NEILSON
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Orlando, Florida 32801
(305) 843-5291
Attorneys for CH2M HILL
Southeast, Inc.

APPENDIX J

IN THE CIRCUIT COURT FOR
PINELLAS COUNTY, FLORIDA
Civil No. 83-13313-12

PINELLAS COUNTY, a political subdivision of the State of Florida,

Plaintiff,

vs.

INTERPACE CORP.; GHA LOCK JOINT, INC.; CH2M HILL SOUTHEAST, INC.; BUMBY & STIMPSON, INC. and SUWANEE TRANSFER, INC.

Defendants.
_____/

ORDER ON CH2M HILL SOUTHEAST, INC.'s MOTION TO DISMISS COUNTS V AND VI OF THE COMPLAINT

This matter came on to be heard April 23, 1984, on Defendant, CH2M HILL SOUTHEAST, INC.'s Motion to Dismiss Counts V and VI of the Complaint, and the Court having heard argument of counsel and being otherwise duly advised in the premises, it is therefor,

ORDERED AND ADJUDGED that the Motion to Dismiss of CH2M HILL SOUTHEAST, INC. is denied without prejudice and Defendant, CH2M HILL SOUTHEAST, INC., shall file its response to the Complaint within 30 days from the date of this Order.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 2nd day of May, 1984.

_____
Mark R. McGarry, Jr.
Circuit Judge

I HEREBY CERTIFY that a conformed copy hereof has been urnished by mail this 2nd day of May, 1984, to all counsel of ecord on the attached list.

/s/ Lori McKay
Judicial Assistant

SERVICE LIST

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Rev. 4/20/84
108-24

APPENDIX K

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT, IN AND
FOR PINELLAS COUNTY, FLORIDA

CASE NO. 83-13313-8

PINELLAS COUNTY, FLORIDA,

Plaintiff,

vs.

INTERPACE CORPORATION and
CH2M HILL SOUTHEAST, INC.,

Defendants.
_____/

DEFENDANT CH2M HILL SOUTHEAST, INC.,
OBJECTION TO THE PINELLAS COUNTY FIRST
AMENDED MOTION FOR LEAVE TO AMEND COMPLAINT

Defendant, CH2M HILL SOUTHEAST, INC., [hereinafter CH2M HILL] by and through its undersigned attorneys, hereby objects to the First Amended Motion for Leave to Amend Complaint of PINELLAS COUNTY and says:

1. On or about November 23, 1983, PINELLAS COUNTY filed its original Complaint initiating this lawsuit.

2. On December 24, 1987, PINELLAS COUNTY filed a Motion for Leave to Amend Complaint.

3. On March 29, 1988, CH2M HILL filed an objection to the PINELLAS COUNTY Motion for Leave to Amend Complaint. The objection outlined CH2M HILL'S arguments against permitting the Plaintiff to circumvent the statute of limitations and prior Court orders by procedurally amending its Complaint.

4. On April 15, 1988, PINELLAS COUNTY filed a First Amended Motion for Leave to Amend Complaint to which is attached a revised First Amended Complaint for Negligence,

Breach of Contract, Breach of Implied Warranty of Fitness for Particular Purpose, Breach of Implied Warranty of Merchantability, Strict Liability in Tort, Fraud, and Punitive Damages [hereinafter Revised Complaint]. The Revised Complaint raises the same issues that prompted CH2M HILL'S objection of March 29, 1988. In addition, the Revised Complaint alleges two more new and distinct causes of action against CH2M HILL. These new and distinct negligence actions essentially allege that CH2M HILL:

A. Negligently failed to reject shop drawings submitted by the co-defendant Interpace Corporation which shop drawings are claimed to permit the use of Class IV wire. (See Revised Complaint Paragraph 66(S), page 44).

B. Negligently failed to require co-defendant Interpace Corporation to provide wire test specimens and steel test specimens as outlined pursuant to the contract applicable between Interpace Corporation and Pinellas County. (See Revised Complaint Paragraph 66(T), page 44).

4. CH2M HILL objects to the First Amended Motion for Leave to Amend Complaint for the reasons explained in DEFENDANT'S CH2M HILL SOUTHEAST, INC., OBJECTION TO THE PINELLAS COUNTY MOTION FOR LEAVE TO AMEND COMPLAINT filed on March 29, 1988. CH2M HILL raises all the legal and equitable arguments stated in its March 29, 1988, objection as if stated verbatim herein.

WHEREFORE, CH2M HILL SOUTHEAST, INC., respectfully requests that this Court;

(1) deny the First Amended Motion to Amend the Complaint as to those claims raising new negligence actions that are barred by the statute of limitations.

(2) deny the First Amended Motion to Amend the Complaint or in the alternative limit the Plaintiff's remedies under the Amended Complaint to those damages attributable solely to each Defendant's relative degree of fault, and

(3) reassert that Pinellas County's relief against any Defendant is limited to the percentage of Plaintiff's damages attributable solely to each Defendant's negligence without any right to relief based on vicarious, collateral, joint and several or any other form of derivative liability.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 10th day of May, 1988, by U.S. mail to: JOHN T. ALLEN, JR., ESQUIRE, 4508 Central Avenue, St. Petersburg, FL 33711; G. LEE GARRETT, JR., ESQUIRE, 3300 First Atlanta Tower, Atlanta, GA 30383; MICHAEL J. KEANE, ESQUIRE, Post Office Box 31687, St. Petersburg, FL 33732; and to JEFFREY S. O'BRIEN, ESQUIRE, Post Office Box 3542, St. Petersburg, FL 33731.

_____

STEPHEN M. BULL, ESQUIRE

_____

STEVEN R. SCHOOLEY, ESQUIRE
BULL & MIZE
111 North Orange Avenue, Suite1200
Orlando, Florida 32801
Telephone: 305/843-5291

Attorneys for Defendant
CH2M HILL SOUTHEAST, INC.

SRS:sa
108-024

APPENDIX L

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

Circuit Civil No. 83-13313-08

PINELLAS COUNTY,

Plaintiff,

vs.

INTERPACE CORPORATION and
CH2M HILL SOUTHEAST, INC.,

Defendants.
_____/

ORDER GRANTING MOTION OF PLAINTIFF, PINELLAS COUNTY, TO FILE FIRST AMENDED COMPLAINT

THE FOREGOING CAUSE came on to be heard upon Plaintiff, PINELLAS COUNTY'S, Motion to file First Amended Complaint and the same having been argued by counsel for the respective parties and duly considered by the Court, it is,

ORDERED AND ADJUDGED as follows:

(1) Plaintiff, PINELLAS COUNTY'S, Motion be and the same is hereby granted upon the condition that the Plaintiff, PINELLAS COUNTY, file a More Definite Statement as to the fraud count, Count VIII, within 10 days from May 16, 1988. Service of the First Amended Complaint shall be made upon the Defendants simultaneous with the filing of the More Definite Statement.

(2) Defendants shall have twenty (20) days after service of the First Amended Complaint and More Definite Statement as ordered by this Court in which to plead to Plaintiff's First Amended Complaint.

DONE AND ORDERED in chambers, St. Petersburg, inellas County, Florida, this 20 day of May, 1988.

/s/ FRED L. BRYSON
Circuit Judge

Copies furnished to:

ohn T. Allen, Jr., Esquire
Michael J. Keane, Esquire
G. Lee Garrett, Jr., Esquire
Stephen Bull, Esquire
effrey O'Brien, Esquire

APPENDIX M

Excerpts of the First Amended Complaint for Negligence, Breach of Contract, Breach of Implied Warranty of Fitness for Particular Purpose, Breach of Implied Warranty of Merchantability, Strict Liability in Tort, Fraud, and Punitive Damages

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IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
Circuit Civil No. 83-13313-08

PINELLAS COUNTY,

Plaintiff

vs.

INTERPACE CORPORATION,
CLEVEPAK CORPORATION, AND
MADISON MANAGEMENT GROUP, INC.,
AS SUCCESSORS OF INTERPACE
CORPORATION; AND CH2M HILL
SOUTHEAST, INC.,

Defendants.
_____/

FIRST AMENDED COMPLAINT FOR NEGLIGENCE, BREACH OF CONTRACT, BREACH OF IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE, BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY, STRICT LIABILITY IN TORT, FRAUD, AND PUNITIVE DAMAGES

The Plaintiff, PINELLAS COUNTY, by its undersigned attorney, sues the Defendants, INTERPACE CORPORATION, a foreign corporation; CLEVEPAK CORPORATION, a foreign corporation, and MADISON MANAGEMENT GROUP, INC., a foreign corporation, as successors of INTERPACE CORPORATION; and CH2M HILL SOUTHEAST, INC., a Florida corporation, and avers:

COUNT I
NEGLIGENCE

1. At all times material to this First Amended Complaint, the Plaintiff, PINELLAS COUNTY, is a political subdivision of the State of Florida.

2. At all times material to this First Amended Complaint, the Defendant, INTERPACE CORPORATION, is a foreign corporation organized and existing under the laws of the State

of Delaware and is authorized to do business in the State of Florida. On or about July 2, 1981, GHA Lock Joint, Inc. purchased certain domestic assets of the Lock Joint Products Division of the Defendant, INTERPACE CORPORATION, and contractually agreed to assume certain liabilities incurred by the Defendant, INTERPACE CORPORATION. Plaintiff is a third-party beneficiary of the contract entered into between GHA Lock Joint, Inc. and the Defendant, INTERPACE CORPORATION, or its subsidiary. On or about May 3, 1985, the Defendant, INTERPACE CORPORATION, merged with or changed its name to Clevepak Corporation, and subsequently merged with or changed its name to Madison Management Group, Inc. on or about July 9, 1987. Consequently, Clevepak Corporation and/or Madison Management Group, Inc. are successors of the Defendant, INTERPACE CORPORATION, and are liable for any and all acts alleged herein to which the Defendant, INTERPACE CORPORATION, is liable.

3. In March of 1975, the Plaintiff. PINELLAS COUNTY, executed an agreement with the consultant engineer, Black, Crow and Eidsness, Inc., whose corporate name has been changed to CH2M HILL SOUTHEAST, INC., for the design of a transmission main and selection of a route from the point of termination of the Cypress Creek transmission main which is located at the Pasco-Pinellas County line to the North Booster Station located on U.S. Highway 19 north of S.R. 580. In February of 1977, the Plaintiff, PINELLAS COUNTY, executed a contract with the Defendant, INTERPACE CORPORATION, as the pipe manufacturing contractor, for the furnishing of approximately 63,400 linear feet of prestressed concrete pipe, 60 inches in diameter, and 8,160 linear feet of prestressed concrete pipe, 54 inches in diameter, together with other fittings and specials. Both Defendants knew before entering into their obligation in relation to said transmission lines, that both the 54-inch diameter and, in particular, the 60-inch diameter transmission line, described herein, would constitute the heart of the Pinellas County Water System, and would supply water to all retail customers of the Pinellas County Water System and five wholesale customers of the Pinellas County Water System who are Pasco County and four municipalities located within Pinellas County. Said transmission lines were to be utilized and are being utilized at the present time to receive water from the County's Cypress Creek Wellfield and the County's Cross Bar Ranch Wellfield located in Pasco County.

4. Both Defendants knew or should have known that said pipelines were to be the most critical transmission line and an integral part in the entire Pinellas County Water System which, after construction, could not be taken out of service except under extremely unusual conditions, and for short periods of time during the rainy season or the winter months. So critical is the utilization of said transmission lines that without their existence, or should their use be disrupted for any unreasonable or substantial period of time, a water emergency or water crisis would have to be declared in Pinellas County which would result in water rationing.

5. As a result of the need for said transmission lines, the Plaintiff, PINELLAS COUNTY, contracted in Pinellas County with the following named Defendants for the following indicated services for the design, creation of specifications, and manufacture of said transmission lines:

(A) With Defendant, INTERPACE CORPORATION, the pipe manufacturing contractor, a contract for the manufacture of the 60-inch diameter and 54-inch diameter transmission pipe sections which were to be installed into the transmission pipelines, said contract being executed on the 25th day of February, 1977, wherein the Defendant, INTERPACE CORPORATION, was to supply through its Lock Joints Products Division, pipeline sections for construction of the pipelines. A copy of the material portions of the contract documents is attached to this Complaint together with the appropriate bid and bidding information accepted by the Defendant, INTERPACE CORPORATION, as Plaintiff's Exhibit "A".

(B) With Defendant, CH2M HILL SOUTHEAST, INC., which was known by the name of Black, Crow and Eidsness, Inc. at the time of the execution of a contract dated the 24th day of March, 1975, between the Plaintiff, PINELLAS COUNTY, and Black, Crow and Eidsness, Inc. for Black, Crow and Eidsness, Inc. to act as the County's consulting engineers, wherein Black, Crow and Eidsness, Inc., was to provide, among other duties, route selection survey; selection of the choice of materials to be specified for the component parts of the pipeline; the investigation of above-ground and below-ground chemical, physical, soil, groundwater, and electrical conditions and their potential effects on the materials selected for the component parts of the pipeline; to provide the final design and construction plans and specifications for the pro-

ject; provide consultation and advise as to the necessity of providing or obtaining other services such as laboratory testing and inspection of samples or materials and special consultations; and to provide construction supervision such as visiting the construction site on an average of four (4) times per month to protect the owner against defects and deficiencies in the work of the contractor, to check shop drawings and descriptive data as to the general conformity to the plans and specifications of the project, and to require special examination or testing of the work and recommend final acceptance of the work. A copy of said contract is attached to this Complaint as Plaintiff's Exhibit "B".

6. Thereafter, the Defendant, INTERPACE CORPORATION, through its Lock Joint Products Division, pursuant to the plans and specifications designed and written by the Defendant, CH2M HILL SOUTHEAST, INC., as more particularly described in Plaintiff's Exhibit "A", commenced construction of the pipe sections, fittings, and other specials which, when fitted together, would constitute the 60-inch diameter and 54-inch diameter pipelines.

7. Throughout the period from approximately the 25th day of February, 1977, to the early part of 1978, the Defendant, INTERPACE CORPORATION, designed and manufactured sections of the 60-inch diameter and 54-inch diameter pipes, pipe fittings, and specials, which were delivered to the respective construction areas and installed in the ground by Bumby & Stimpson, Inc., the installation contractor. The said 60-inch diameter pipeline, when completed, consisted of approximately 12 miles of pipeline or 63,400 linear feet of pipe. The 54-inch diameter pipeline consists of approximately 1.5 miles of pipeline or 8,160 linear feet of pipe.

8. The additional importance of the 54-inch diameter pipeline is that along with a parallel 42-inch diameter main, it connects, at its northern end, to the West Coast Regional Water Supply Authority (WCRWSA) regional 66-inch diameter transmission main near the Pasco-Pinellas County line, and transports all potable water made available to Pinellas County from the Cross Bar Ranch and Cypress Creek Wellfields operated by WCRWSA in neighboring Pasco County to the north. At its northern end, the 60-inch diameter pipeline connects to the southern ends of the parallel 42-inch diameter and 54-inch diameter pipelines, the Eldridge-Wilde Wellfield transmission main, and distribution mains adjacent

o, and near, the S.K. Keller Pump Station, and transports the available water south into the densely populated areas of Pinellas County. The 60-inch and 54-inch diameter pipelines thus form the major transmission conduit and lifeline for system users of potable water coming from the three major wellfields to the north. The 60-inch and 54-inch diameter pipelines are an integral part of the entire Pinellas County Water System.

9. On the 2nd day of October, 1978, the 60-inch diameter pipeline was completed and placed into service and on the 2nd day of October, 1978, the 54-inch diameter pipeline was completed and placed into service.

10. Thereafter, the Plaintiff, PINELLAS COUNTY, utilized the 60-inch diameter pipeline and the 54-inch diameter pipeline for the supply of potable water to its retail and wholesale customers of the Pinellas County Water System. On the 13th day of November, 1979, in the area of a community known as East Lake Woodlands, a section of the 60-inch diameter pipeline exploded and ruptured, causing the opening of a gigantic hole in the area of the pipeline, rendering a section of the 60-inch diameter pipeline totally unusable. As a result of the pipeline failure, the Plaintiff, PINELLAS COUNTY, embarked upon an extensive investigation to determine the cause of the pipeline failure. Thereafter, commencing on the 19th day of November, 1979, the Plaintiff, PINELLAS COUNTY, through its consulting engineers, Jones, Edmunds & Associates, Inc., conducted an extensive investigation into the design and manufacture of both the 60-inch diameter and 54-inch diameter transmission lines. A pressure test to the design working pressure of 150 pounds per square inch (psi) took place in the 60-inch diameter transmission line between Station 82+88 and Station 243+00 on the 11th day of December, 1980, resulting in a rupture of the pipeline 90 seconds after the design working pressure was attained. An examination of the resulting rupture revealed evidence of severe corrosion pitting on the wire at the rupture location and the discovery of severely corroded broken wires beneath a delamination in the outer coating. Subsequently, a detailed inspection of pipe condition, pipe design, and pipe materials was performed on pipes removed from throughout the 60-inch diameter and 54-inch diameter transmission lines. This inspection resulted in the additional finding of sections of pipeline which were faulty in design, failed to meet specifications for the construction of the

pipeline, and were the result of faulty manufacturing techniques, all of which have resulted in the determination by the Plaintiff, PINELLAS COUNTY, that both the 60-inch diameter and 54-inch diameter transmission lines are undependable and riddled with defective pipe, which will result in periodic and frequent failures of numerous and various sections of pipeline in the future to the point that said pipeline needs to be totally replaced at a cost in excess of Sixteen Million Dollars. The rupture of the 60-inch diameter pipeline on November 13, 1979 and the second rupture of the 60-inch diameter pipeline on December 11, 1980 both caused extensive other property damage to the Plaintiff, PINELLAS COUNTY, and to private landowners, in addition to causing extensive damage to the pipeline itself, as follows:

(A) Internal labor by the Plaintiff, PINELLAS COUNTY; equipment and material costs; the administrative staff required to respond to both ruptures, including personnel needed to respond initially to the rupture sites and travel to and from the scenes; professional engineering services required to ascertain needed repairs and to specify repair materials; the time of the Plaintiff's, PINELLAS COUNTY'S, Water System and purchasing personnel to order materials and to engage a contractor, to inspect the repair work, to perform chlorination, and to perform laboratory work; and the demands on the Plaintiff's, PINELLAS COUNTY'S, Water System resources to advise media, consumers, and other government agencies, and to negotiate with homeowners and landowners concerning repairs required to damaged private property proximately caused by the rupture or ruptures;

(B) Direct and indirect contract costs for labor, equipment, and materials, including the costs to acquire fill dirt to replace dirt lost through erosion; repair of damaged private landscaping; restoration of the rupture sites; repair of water damage to a nearby private residence; excavation and removal of failed pipe sections; transportation, offloading, and installation of replacement pipe; investigation of possible damage to adjacent pipes; and removal and disposal of damaged pipe;

(C) The acquisition of additional easements and rights-of-way adjacent to the pipeline to build a safety zone to protect private structures, high-use areas including roads and high-value areas including private buildings, and homes from future calamitous ruptures that will occur, within a reasonable degree of engineering probability;

(D) The loss of large amounts of water from the initial rupture and from necessary flushing, cleaning, and sanitation operations;

(E) The loss of revenues due to reduced water pressures after the 60-inch diameter pipeline ruptures and during repairs, and also intangible economic loss of revenues and property loss to the Plaintiff, PINELLAS COUNTY; and

(F) Damage to the entire water system of the Plaintiff, PINELLAS COUNTY, in that the losses and the risks incurred as a direct result of the defective transmission lines are not the types of losses and risks normally allocated to the purchaser of this type of product. The 54-inch and 60-inch diameter transmission lines are an integral part of the entire Pinellas County Water System, providing a major or sole source of water to certain areas for fire protection, sanitary services, consumption uses, hygiene uses, and other services vital to the populous of Pinellas County. The likelihood of future major personal injury and property damage is greatly increased by the Plaintiff, PINELLAS COUNTY, not receiving transmission lines built to high standards of quality for a long service life as normally anticipated in the industry, thus jeopardizing the health, safety, and welfare of the customers and residents of Pinellas County.

11. The two pipe ruptures to date have caused other property damage, as enumerated in paragraph 10, supra, in addition to consequential damages, and damages to the pipeline itself and the entire Pinellas County Water System, as the pipeline is an integral part of the entire system and is interconnected to and is interdependent with the entire system. The Defendant, INTERPACE CORPORATION, agreed that its product would meet the Plaintiff's, PINELLAS COUNTY'S, reasonable economic expectations, and although the Plaintiff, PINELLAS COUNTY, relied on the Defendant's, INTERPACE CORPORATION'S, skill and judgment to select and to furnish a suitable product consisting of suitable materials, the Defendant, INTERPACE CORPORATION, did not exercise reasonable care in the design and manufacture of the pipe components, resulting not only in damage to the product itself but also other damage to property. The failure by the Defendant, INTERPACE CORPORATION, to exercise reasonable care in the design and manufacture of the pipe components resulted in the creation of a continuing and worsening condition that is unreason-

ably dangerous to both persons and property and that will, within a reasonable degree of engineering probability, cause future damage to the pipeline and therefore to the entire Pinellas County Water System, in addition to future other property damage to the Plaintiff, PINELLAS COUNTY, and potential future damage to the property of private citizens and personal injury to private citizens and to county personnel, as the pipeline is located adjacent to homes, buildings, and roads in congested Pinellas County, for which the Plaintiff, PINELLAS COUNTY, will be responsible.

Furthermore, the Defendant, INTERPACE CORPORATION, breached the standards of the pipe manufacturing industry and the standards of general custom and usage in the pipe manufacturing industry by its negligent design, manufacture, and marketing of a defective product which is unreasonably dangerous and riddled with latent defects, thereby creating an unreasonable, dangerous condition.

The unreasonably dangerous condition created by the Defendant, INTERPACE CORPORATION, was the proximate cause of two sudden, dangerous, and calamitous pipe ruptures, and the existing unreasonable, dangerous condition will be the proximate cause, within a reasonable degree of engineering probability, of future damage to the pipeline itself, the entire water system, and to other property.

The deteriorating condition of the pipeline components will, within a reasonable degree of engineering probability, result in more future, sudden, dangerous, and calamitous pipe ruptures, which will proximately cause future damages to the pipeline, the water system, and to other property.

The risk of damages to the pipeline and to other property as a result of the knowing creation of an unreasonably dangerous condition by the Defendant, INTERPACE CORPORATION, was reasonably foreseeable to the Defendant, INTERPACE CORPORATION, was hidden to the Plaintiff, PINELLAS COUNTY, and cannot be considered to be a part of any ordinary contractual risk.

12. The Defendant, INTERPACE CORPORATION, carelessly and negligently designed, manufactured, and produced the 60-inch diameter and the 54-inch diameter pipes, pipe fittings, and specials, and negligently and carelessly fell below the standards commensurate in the industry for the design and manufacture of pipes, pipe fittings, and specials in the following respects:

(A) The material parameters used in the design of the pipes were different from and superior to the characteristics of the materials used to fabricate the pipe or, in other words, the materials utilized in the manufacture of the pipe did not meet the design assumptions in that:

(1) The modules of elasticity of the concrete at the time the pipes were prestressed was less than that assumed to compute the initial modular ratio submitted by the contractor (INTERPACE CORPORATION) to the engineer (Black, Crow and Eidsness, Inc.), approved by the engineer, and used in the design;

(2) The resultant modulus of elasticity of the concrete assumed to compute the resultant modular ratio submitted by the contractor (INTERPACE CORPORATION) to the engineer (Black, Crow and Eidsness, Inc.), approved by the engineer, and used in the design to calculate the losses in concrete prestress, was higher than the resultant modulus of elasticity of the concrete used in the fabrication of the pipe;

(3) The combined modulus of elasticity of the steel cylinder and prestressed wires assumed to compute the initial and resultant modular ratios submitted by the contractor (INTERPACE CORPORATION) to the engineer (Black, Crow and Eidsness, Inc.), approved by the engineer, and used in the fabrication of the pipe was higher than the combined modulus assumed in the design;

(4) The creep of the concrete used in the fabrication of the pipe exceeded the concrete creep assumed in the design of the pipe;

(5) The three-edge bearing strength of the pipe did not consistently meet the minimum value assumed in the design calculations;

(6) The creep factor assumed in design was insufficient to compensate properly for actual material properties and/or for the variations in factors affecting the actual behavior of the pipe;

(7) The wire embedment and/or relaxation losses assumed in design were insufficient to compensate properly for actual material properties and/or for the variations in factors affecting the actual behavior of the pipe;

(8) The steel cylinder thickness assumed in the design calculations was less than the value specified and less than the cylinder thickness actually provided, resulting in less prestressing wire being applied to the concrete than necessary to resist the internal pressure; and

(9) The material components of the pipe were chosen, assembled and manufactured so as to result in a final product that failed to meet the pressure at zero core concrete stress, P_0, to achieve the design required by project specifications, and represented as being provided by the Defendant, INTERPACE CORPORATION.

As a direct and proximate result of the use of the incorrect parameters in the design, the Defendant, INTERPACE CORPORATION, provided to the Plaintiff, PINELLAS COUNTY, pipe which was lower in strength; which failed to meet the specified design working pressure of 150 psi and specified design plus surge (water hammer) pressure of 210 psi; and which had less safety factor than represented by the manufacturer, INTERPACE CORPORATION, and required by the specifications for the manufacture of the pipe as specified in Plaintiff's Exhibit "A".

(B) The concrete materials used in the fabrication of the pipe did not meet the specification requirements as contained in Plaintiff's Exhibit "A" in that:

(1) The fine aggregate incorporated in the concrete core and the mortar coating over the prestressed wires was more finely graded than permitted by the specification limits (AWWA C-301-72);

(2) The coarse aggregate incorporated in the concrete contained deleterious substances in the form of minus 200 (-200) mesh sieve material, soft particles, clay lumps, and the combination thereof in excess of the amounts permitted by the specifications limits (AWWA C-301-72);

(3) Chemical admixtures were used in the concrete without the permission or knowledge of the purchaser, Plaintiff, PINELLAS COUNTY, as required by the specifications. The type of admixture and quantity used was changed without notifying the purchaser, Plaintiff, PINELLAS COUNTY;

(4) The mortar coating did not consistently meet the specification requirement (AWWA C-301-72) that

the mortar coating consist of one part cement to three parts fine aggregate;

(5) Mortar was used as the coating material for the subject pipe instead of the specified required concrete coating;

(6) The Defendant, INTERPACE CORPORATION, failed to submit to the Defendant, CH2M HILL SOUTHEAST, INC., the consulting engineers, its test results on materials and the affidavit and certification of compliance with all applicable provisions of the standard as required in AWWA C-301-72, and certifications as required in their contract with the Plaintiff, PINELLAS COUNTY; and

(7) The Defendant, INTERPACE CORPORATION, failed to utilize a mortar mix of sufficient richness to permit a high moisture content for coating placement, and to thereby provide a coating of sufficient quality to protect the prestress wire adequately.

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, through the use of nonconforming materials, the concrete used in the fabrication of the pipe did not possess the qualities deemed essential and required by the specifications to ensure adequate performance and durability of the pipe. The use of the admixtures to attempt to compensate for the deficiencies of the materials and procedures used was hidden from the purchaser, Plaintiff, PINELLAS COUNTY, contrary to the requirements of the contract between the Plaintiff, PINELLAS COUNTY, and the Defendant, INTERPACE CORPORATION.

(C) The prestress wire used in the fabrication of the pipe did not meet the specification requirements as contained in Plaintiff's Exhibit "A" or the recognized standards commensurate in the wire drawing industry in that:

(1) The prestress wire consistently failed to meet the specified minimum permissible diameter of 0.1600 inch;

(2) Prestress wire with split seams and serious seams was used in violation of specification requirements (ASTM A-227). Also, wire which was known to be prone to splitting and wire with longitudinal splits was used;

(3) The wire was overdrawn and grossly defective in that it was susceptible to splitting, environmentally assisted crack growth (stress corrosion and hydrogen embrittlement), and pitting, resulting in failure in the environment in which it was known or should have been known that it was going to be exposed and placed into service;

(4) The temperature of the lead quench portion of the patenting furnace was improperly lowered below the minimum acceptable temperature for production of satisfactory patenting rod to increase rod strength and increase the strength of the wire drawn therefrom;

(5) The temperature of the wire was not properly controlled during the wire drawing process and the wire was not cold drawn as required by the project specifications and the applicable national standards, thereby allowing the wire's temperature to rise beyond the maximum allowable temperature for production of satisfactory quality wire, and thereby creating wire that lacked sufficient ductility for its intended purpose;

(6) The rod used to make the prestress wire was of the incorrect dimension and inappropriate quality;

(7) The cleaning and coating of the patented rod, prior to wire drawing, was improper and inadequate, resulting in increased wire drawing temperature, and consequent hydrogen charging and embrittlement of the wire;

(8) The Defendant, INTERPACE CORPORATION, failed to discard rod which had been subjected to stoppage and improper speeds in the lead patenting line, resulting in the use of improperly and defectively patented rod in the manufacture of the wire;

(9) "Class IV", 8-gauge prestressing wire, used throughout the pipe, was wire with a strength and quality not recognized or recommended by any national standards, organization, or published specification. This prestress wire was manufactured and used solely to obtain a cost advantage over competitors;

(10) The development of "Class IV" wire was not done by, or under the supervision of, personnel competent in the field of wire manufacturing or wire metallurgy;

(11) The wire was inadequately tested during its development and manufacture by the Defendant, INTERPACE CORPORATION, by their failure to apply all of the

appropriate tests, including the torsion test, thoroughly and completely; by their failure to explore the properties and performance of the wire fully; by their failure to properly account for all of the stresses in the installed wire which result in excessive relaxation, relative to the design assumptions, resulting in inadequate prestressing of the wire on the pipe; and by their failure to interpret the nature of the results correctly and prudently of the few inadequate tests that were performed;

(12) The equipment used in the wire drawing process was not properly maintained, calibrated, or prepared for use;

(13) The "Class IV" wire was improperly manufactured and drawn in that the Defendant, INTERPACE CORPORATION, used improper wire drawing equipment which had either a 5 or, at best, a 6 drawing die capability, whereas it is metallurgically impossible to make proper "Class IV", 8-gauge wire, especially with 5 or 6 die drawing practice;

(14) During manufacture of the "Class IV" wire and prior to its being sent to the manufacturing plant to be wrapped on the pipe sold to the Plaintiff, PINELLAS COUNTY, the Defendant, INTERPACE, CORPORATION, failed to stress relieve the "Class IV" wire which it manufactured, in order to make it less susceptible to corrosion. By the Defendant's, INTERPACE CORPORATION'S, failure to stress relieve the "Class IV" wire prior to placing it on the pipe sold to the Plaintiff, PINELLAS COUNTY, the Defendant, INTERPACE CORPORATION, made the wire much more susceptible to corrosion and thus ultimate failure by failing to utilize the stress relieving process;

(15) The Defendant, INTERPACE CORPORATION, failed to produce wire of proper ductility in that the wire developed serious seams both during and following manufacture. Therefore, non-ductile wire was placed upon the pipe sold to the Plaintiff, PINELLAS COUNTY. The Defendant, INTERPACE CORPORATION, further failed to perform any torsion test in the development and manufacturing stages of production of the wire, which if performed would have shown that the wire did not pass the torsion test and therefore was not ductile and should not have been used in the manufacture of prestressed concrete pipe sold to the Plaintiff, PINELLAS COUNTY;

(16) During the manufacture of the pipe sold to the Plaintiff, PINELLAS COUNTY, the Defendant, INTERPACE CORPORATION, wrapped the prestress wire at stress levels above the elastic limit of the wire. Due to the extremely high and deleterious wire temperatures permitted during wire manufacturing, this caused the wire to go into relaxation more than calculated in design, and thereby lowered the P_O of the pipe, thus producing pipe with lower working pressure and surge pressure than calculated in design;

(17) The Defendant, INTERPACE CORPORATION, manufactured and produced "Class IV" wire which was placed on pipe sold to the Plaintiff, PINELLAS COUNTY, and which had the characteristic of tending to produce "star fractures" with longitudinal splitting in the fracture surface. This type of fracture is recognized in the wire-making industry as an indication of defective and brittle wire. Therefore, the Defendant, INTERPACE CORPORATION, failed to place properly manufactured wire on the pipe sold to the Plaintiff, PINELLAS COUNTY, and, instead, furnished wire containing longitudinal seams and planes of weakness which, when subjected to environmental conditions not sufficiently severe to cause pitting, nonetheless produced stress corrosion cracking and hydrogen embrittlement in the defective wire furnished by the Defendant, INTERPACE CORPORATION;

(18) The fact that the Defendant, INTERPACE CORPORATION, produced defective "Class IV" wire in each and every pipe sold to the Plaintiff, PINELLAS COUNTY, and that such defects require a total replacement of the pipeline sold to the Plaintiff, PINELLAS COUNTY, by the Defendant, INTERPACE CORPORATION, is demonstrated by the fact that there have been numerous pipe failures in pipe containing defective "Class IV" wire and other manufacturing defects as alleged in this Amended Complaint. These pipe failures throughout the country on other pipe sold to other customers by the Defendant, INTERPACE CORPORATION, demonstrate that "Class IV" wire constitutes an inherent latent defect and prove, with a reasonable degree of engineering probability, that the pipeline sold to the Plaintiff, PINELLAS COUNTY, will prematurely fail;

(19) The Defendant, INTERPACE CORPORATION, failed to provide wire test specimens and other steel test specimens to the Defendant, CH2M HILL SOUTHEAST, INC., as

equired by the contract specifications contained in Plaintiff's xhibit "A" and by Section 1.9 of AWWA C-301-72, the applicable ational standard;

(20) The Defendant, INTERPACE CORPO-ATION, failed in general to meet the requirements of Section 1.8 f AWWA C-301-72, requiring the manufacturer to perform all ork in a thorough, workmanlike manner, using mechanics skilled their various trades as evidenced, among many examples, by orroded wire, over-heated wire, wire that failed the torsion test, ire that is extremely sensitive to hydrogen embrittlement and tress corrosion cracking, split wire, brittle wire, wire with seams, usty wire, and non-ductile wire; and

(21) Before commencing commercial pro-luction of prestressed concrete embedded cylinder pipe incorpo-ating "Class IV" wire, the Defendant, INTERPACE CORPORA-ION, failed to investigate sufficiently and conduct adequate pre-iminary testing on "Class IV" wire, and pipes incorporating "Class V" wire. Furthermore, the Defendant, INTERPACE CORPORA-ION, withheld information developed by the Defendant, INTER-PACE CORPORATION, which indicated inferior performance of ipe manufactured using "Class IV" wire in lieu of acceptable wire manufactured pursuant to published material standards.

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, the subject pipeline's prestress wire is so defective, and its safety factor against failure is so continuously being reduced, that the pipeline is unreliable, will continue to fail prematurely in service, and constitutes a hazard to the community and surrounding areas and to the health, safety, and welfare of community residents where it is located.

(D) The procedures used to manufacture the pipe were not in accordance with the requirements of the specifications contained in Plaintiff's Exhibit "A" in that:

(1) Pipe cores were not cured as required by the specifications (AWWA C-301-72). Cores were "tipped" from their bases and removed to a storage yard prior to 32 hours age. Water spraying was haphazard and only portions of the cores were kept moist for the required curing period;

(2) Water curing of the mortar coating was not maintained for four (4) days as required by the specifica-

tions (AWWA C-301-72). Pipes were prematurely removed from curing and stored in open yard subject to drying and shrinkage;

(3) The minimum clear distance between prestress wires was not maintained at all times, resulting in adjacent wires touching, thereby creating voids which could not be filled with protective slurry or mortar;

(4) Defective concrete and mortar were not removed to the extent necessary to ensure the quality of the pipe;

(5) Repairs were made to the pipe using materials having different constituents, consistencies, and qualities from those required by the specifications contained in Plaintiff's Exhibit "A";

(6) Work was not performed in a workmanlike manner by properly trained employees and mechanics skilled in their trade;

(7) The precast concrete cores consistently failed to meet the specified minimum core thickness;

(8) The coating consistently failed to meet the specified 7/8-inch minimum coating thickness;

(9) Pipe was improperly handled during manufacture by allowing unwrapped or wrapped pipe to be contaminated with mud, soil, or clay, resulting in inclusions of mud, soil, or clay between the wires and beneath the coating;

(10) Wire splices found on individual pipes were of such frequency that some of the pipes had to have been produced with four or more separate sections of wire, providing clear evidence as to the poor quality of the wire at the time of wire wrapping;

(11) Pipe coating was not properly deposited and consolidated to produce a dense, durable wire encasement as required by the specifications (AWWA C-301-72). Failure to consolidate the coating properly and sufficiently created a non-uniform coating with a zone of high porosity and low cement paste content at the prestress wire level and beneath wire haunches, thereby failing to protect the wire adequately from corrosion;

(12) Inadequate welding practices were used in welding of the steel cylinders, resulting in the probability of cylinder leakage, and corrosion and embrittlement of the prestress wire; and

(13) Total or partial lack of quality control existed at the plant, so that important phases of the pipe's manufacture were uncontrolled and inadequate, resulting in the manufacture of substandard pipe which will ultimately and prematurely fail in service.

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, and because of the deficiencies hereinabove alleged, the concrete pipe produced were of variable and uncertain quality resulting in imperfections and weak areas in unknown locations, subject to environmentally induced wire corrosion and embrittlement, excessive stresses, reduced safety factors, reduced durability, and premature pipe failure.

(E) The equipment used to fabricate the pipe was not properly maintained, calibrated, or prepared for use. In addition, the Defendant, INTERPACE CORPORATION, was careless and negligent in that:

(1) Welding rods used to fabricate the steel cylinders were not maintained in adequately heated dry storage as recommended by the rod manufacturer to ensure satisfactory welds;

(2) Molds were not thoroughly cleaned before each use as required by the specifications (AWWA C-301-72) resulting in imperfect concrete surfaces with numerous voids;

(3) Molds were not properly assembled and sealed which produced cores that have irregularities and offsets in the surface at the mold gates, variable wall thickness, thin on one side, and eccentrically positioned cylinders within the core, resulting in stresses within the pipe greater than those for which it was designed; and

(4) Application of the cement slurry prior to coating the prestress wire was erratic and insufficient, resulting in areas throughout the pipeline which are highly susceptible to corrosion of the prestress wire. Specifically, the slurry was of improper consistency. Also, the slurry application was erratic or non-existent, and was insufficient beneath the wire haunches, in the area where the wire contacts the precast concrete core, and on the remaining wire surface areas. This deficient application of slurry has subsequently failed to provide a protective environment for the wire, resulting in rapid corrosion, including embrittlement, of

the prestressed wire and premature ultimate failure.

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, and as a consequence of the above-described deficiencies, the pipeline was supplied with less strength, capacity, and durability than required by the specifications as contained in Plaintiff's Exhibit "A".

(F) The quality control exercised during production of the pipe was inadequate to ensure pipes were produced in accordance with the specification requirements. As a result of these actions, the Defendant, INTERPACE CORPORATION, was careless and negligent in the following additional respects:

(1) The personnel conducting the quality control tests required by the specifications were not qualified or adequately trained;

(2) The quality control tests performed were not made in accordance with the ASTM methods cited in the specifications as required by Plaintiff's Exhibit "A";

(3) Inadequate personnel were employed to assure product conformance with the specifications in all respects;

(4) The quality control program used was inadequate to ensure that pipes conforming to the specifications or that pipes undamaged during the manufacturing process were supplied;

(5) The pipe was manufactured and cured using materials and practices which resulted in carbonation of precast core concrete paste at and beneath the surface upon which the prestress wire was subsequently wrapped, thereby lowering the pH and eliminating the protection of the wire provided by high alkalinity, resulting in corrosion of the prestress wire and ultimate failure;

(6) The pipe was manufactured with coating material containing debris, stones, chunks of hardened concrete, and pockets and lenses of sand unmixed with cement, resulting in inadequate protection of the wire from corrosion;

(7) Prestress wire and coating were applied to precast concrete surfaces contaminated with dirt, oil, and mud, and which concrete surfaces contained numerous unfilled voids, resulting in poor bond of the coating to the core and inadequate protection of the wire from corrosion;

(8) The pipe was manufactured with mortar coating of varying and uncontrolled consistency and moisture content, and was mishandled during manufacturing, resulting in non-uniform coating with zones of high porosity, delaminated coating, cracked coating, coating containing holes and voids, coating prone to excessive shrinkage and shrinkage cracking, and coating with inconsistent and poor bonding properties;

(9) The pipe was manufactured with steel cylinders which were not uniformly round or concentrically positioned, as required by the project specifications, resulting in variable and unknown core concrete stress distributions and the inability to install pipe tapping assemblies dependably;

(10) The pipe was manufactured with prestress wire which was improperly stored, poorly protected from the weather, and, as a result, corroded at the time of pipe manufacture; and

(11) The Defendant, INTERPACE CORPORATION, failed to inspect the pipe properly prior to shipping to guard against coating drumminess and separation of the coating from the joint rings or the core;

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove described, the above-described deficiencies resulted in the delivery of a pipeline which did not conform to the specification requirements and had imperfections making it susceptible to deterioration and corrosion of the prestressed wires leading ultimately to failure.

(G) The field repairs conducted by the Defendant, INTERPACE CORPORATION, of damaged pipe were made under the supervision of the manufacturer's representative and were not adequate to prevent corrosion of the prestress wire.

(H) Accelerated corrosion tests were done on "Class IV", 8-gauge prestress wire, the results of which indicated poor performance of such wire relative to the other classes of wire in the categories of stress corrosion cracking and pitting corrosion. These significant results and information were withheld by the Defendant, INTERPACE CORPORATION, from consulting engineers and customers.

(I) Tests on the coating of experimental pipe manufactured with "Class IV" prestress wire were done, the results

of which indicated poor coating cracking performance. These significant test results and information were withheld by the Defendant, INTERPACE CORPORATION, from consulting engineers and customers.

(J) The Defendant, INTERPACE CORPORATION, failed to protect properly the prestress wire incorporated into the subject pipe in that:

(1) Said wire was placed upon carbonated precast concrete cores. Carbonated concrete cores create an environment under the prestress wire which fails to provide uniform and sufficient alkalinity to protect the wire, thus violating one of the fundamental assumptions of prestressed concrete pipe development, and thereby resulting in corrosion of the corrosion-susceptible "Class IV", 8-gauge prestress wire and ultimate failure;

(2) The Defendant, INTERPACE CORPORATION, placed rusty, corroded, or corrosion-pitted wire on the pipe, thereby creating a concealed condition in manufacture, wherein the wire corrosion process was already initiated at the time of pipe manufacture, thereby making the entire pipeline much more susceptible to failure;

(3) The Defendant, INTERPACE CORPORATION, failed to require a slurry coating on the wire just before wrapping the pipe to eliminate wire corrosion at the interface of the wire and the precast concrete core; and

(4) Furthermore, application of the cement slurry following prestressing was erratic, insufficient or nonexistent, and of improper consistency beneath the wire haunches in the area where the wire contacts the precast concrete core, and on the remaining wire surfaces.

As a consequence, the prestress wire has undergone continued rapid corrosion, including embrittlement, resulting in premature, ultimate failure.

(K) The Defendant, INTERPACE CORPORATION, had written intercompany procedures, known as Manufacturing Procedures (MP's), Testing Procedures (TP's), Material Specifications (MSP's), and Operations Circulars (OC's), which set forth the company's own standards to be met and followed during the manufacturing and testing of the pipe. In addition, a manual of quality control procedures was published for use within the company setting forth what were known to be, based

pon experience and prudent engineering, minimum standards to e followed to ensure a quality product. These intercompany pro-edures and manuals reflect, in part, some evidence of the standard f care to which a reasonable manufacturer of prestressed concrete ipe should be held. These manuals were not consistently fol-owed nor adhered to, resulting in an inferior, defective pipe of a uality and durability substantially less than could have been the ase had these manuals been followed, and substantially less than he Plaintiff, PINELLAS COUNTY, had bargained for in retaining a ationally known prestressed concrete pipe manufacturer.

(L) The Defendant, INTERPACE CORPORA-ION, failed in general to make pipe according to the specifications n Plaintiff's Exhibit "A", including AWWA C-301-72.

13. Properly manufactured pipe which was to be deliv-ered by the Defendant, INTERPACE CORPORATION, to the Plaintiff, PINELLAS COUNTY, was advertised or represented by he Defendant, INTERPACE CORPORATION, to last for 100 years nd, in fact, if properly designed and manufactured, should or would last indefinitely. The pipe, and as a result the pipelines, namely the 60-inch diameter and 54-inch diameter transmission lines, designed and manufactured by the Defendant, INTERPACE CORPORATION, are inherently defective with defects as herein-above alleged which were latent and undiscoverable by the Plaintiff, PINELLAS COUNTY, unless the pipe itself was inspected through destruction of the pipe thus rendering it useless for service in the pipeline. As a result of the construction, design, and manu-facture of the above-described latent defects, the Plaintiff, PINEL-LAS COUNTY, was unaware of the existence of said latent defects until, through its lengthy and scientific investigation, the determi-nation and existence of said latent defects in its transmission lines became known to the Plaintiff, PINELLAS COUNTY the 3rd day of September, 1980, when at said time, the Plaintiff, PINELLAS COUNTY, placed the Defendant, INTERPACE CORPORATION, on notice of its responsibilities for furnishing the Plaintiff defective pipelines. Said latent defects were not discoverable through rea-sonable diligence of the Plaintiff, PINELLAS COUNTY, until said date because said latent defects could only be discoverable by destruction of the pipe itself. The fact that other INTERPACE CORPORATION pipeline failures occurred throughout the country involving INTERPACE CORPORATION pipes with "Class IV", 8-

gauge wire put INTERPACE CORPORATION on notice of a severe problem with "Class IV", 8-gauge wire, and other problems with pipe material components and design defects, before the manufacture of the Plaintiff's, PINELLAS COUNTY'S, pipeline. Nevertheless, the Defendant, INTERPACE CORPORATION, manufactured the Plaintiff's, PINELLAS COUNTY'S, pipeline using defective material that created dangerous latent defects in the pipeline.

The fact that other failures of the Defendant's, INTERPACE CORPORATION'S, pipelines have continued, and are continuing, throughout the country indicates that the Defendant, INTERPACE CORPORATION, created a dangerous latent condition in the manufacture of the Plaintiff's, PINELLAS COUNTY'S, pipeline.

As hereinabove alleged, the pipeline is an indispensable main artery and an integral part of the entire Pinellas County Water System and cannot be taken out of service for any substantial length of time. Consequently, the Plaintiff, PINELLAS COUNTY, can only periodically examine sections of the pipeline during periods of low demand when service may be temporarily interrupted through said pipelines.

14. As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, the Plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars in that the Plaintiff, PINELLAS COUNTY, has had to repair damage to the pipeline itself and other resulting property damage from the two calamitous ruptures to date; will be required to repair all potential future damages to the pipeline and to other property resulting from the unreasonably dangerous condition created by the Defendant, INTERPACE CORPORATION; will be required to replace the entire 60-inch diameter and the 54-inch diameter transmission lines; will be required in the replacement of said lines to design, acquire, and provide to its water system all materials needed for the construction of said pipelines, which includes but is not limited to surveying and engineering services; testing; supervision, inspection of manufacturing, construction, and inspection of construction; acquiring materials, including new pipe, fittings, specials, valves, and appurtenances; the acquisition of new easements and rights-of ways; the acquisition of temporary construction easements; the removal, disposal, and backfilling of the existing defec-

tive pipeline; road and utility repair; reimbursement of costs to other utilities; work tasks performed by Pinellas County personnel and equipment; administration; and all associated labor, materials, equipment, and costs. In addition thereto, the Plaintiff, PINELLAS COUNTY, has been damaged in that it has been required to incur expenses in costs of inspection and testing of its pipeline to determine the existence of the defects and has been required to hire the services of consulting engineers for said purposes together with other experts, all of which damages exceed the sum of Sixteen Million Dollars.

...

COUNT IX
NEGLIGENCE AGAINST CH2M HILL SOUTHEAST, INC.

Plaintiff, PINELLAS COUNTY, by its undersigned attorney, sues the Defendant, CH2M HILL SOUTHEAST, INC., and avers:

63. Plaintiff, PINELLAS COUNTY, realleges and reavers its allegations contained in Paragraphs 1 through 14, Count I, above.

64. At all times material to this Complaint, Defendant, CH2M HILL SOUTHEAST, INC., is a Florida corporation formerly known as Black, Crow and Eidsness, Inc., who changed its corporate name to CH2M HILL SOUTHEAST, INC. and who is an engineering company organized and existing under the laws of the State of Florida, and is engaged in the engineering profession.

65. The Defendant, CH2M HILL SOUTHEAST, INC., in consideration of the payment of $292,211.16, which was 4.5 percent (%) of the total estimated construction costs of the project, provided final design plans and specifications pursuant to and under the terms of the contract between the Plaintiff, PINELLAS COUNTY, and Defendant, CH2M HILL SOUTHEAST, INC., Plaintiff's Exhibit "B". In addition, the Defendant provided construction supervision for an additional compensation of $72,728.11 which represents 1.12 percent (%) of the estimated construction costs.

66. The Defendant, CH2M HILL SOUTHEAST, INC., carelessly and negligently performed its duties owed to the Plaintiff, PINELLAS COUNTY, under their contract, Plaintiff's Exhibit "B", in the following manner:

(A) Failed to direct properly, to perform, or to have performed soil survey investigations including, but not limited to, soil resistance to the flow of electric current, total soil acidity, soil drainage (groundwater fluctuation), soil texture, soil microbial activity, and soil chemistry; and failed to direct properly, to perform, or to have performed a corrosion testing program to determine the effects of the aforementioned local soil corrosion conditions on the rate of corrosion of prestressed steel wire embedded in mortar. As a direct result of such failure, the pipeline has been exposed to detrimental soil and groundwater conditions resulting in, but not limited to, a deterioration of and damage to the pipe mortar coating and the prestressed wire;

(B) Failed to direct properly, to perform, or to have performed investigations of the pipeline route for stray electrical currents, low soil resistitivities, and aggressive soil and groundwater conditions; failed to design the pipeline to prevent damage by electrolytic currents and stray electrical currents; and failed to consider in the design of the pipeline the effect of overhead voltage lines or any other sources of stray electrical currents on the structural integrity of the prestressed wires and, consequently, the entire pipeline. As a result, electrolytic currents and stray electrical currents have produced damages in, but not limited to, pipeline prestressed wires;

(C) Failed to prepare and review specifications properly for pipe manufacture by approving pipe manufactured with "Class IV" wire when, in fact, there were no recognized specifications which existed providing for such wire; by allowing specifications that did not require the wire to be ductile; by approving pipe designed with inadequate safety factors; by failing to review design calculations for the individual sections of pipe; by allowing the Defendant, INTERPACE CORPORATION, to specify ASTM A-648-73, which is not recognized nor sanctioned in AWWA C-301-72, and furthermore, the provided "Class IV" wire is not recognized nor sanctioned by ASTM A-648-73; by approving the use of 17-gauge cylinder steel instead of the specified 16-gauge cylinder steel; and by specifying only the absolute minimum standards and specifications, thereby permitting defective pipe to be made. Furthermore, the Defendant, CH2M HILL SOUTHEAST, INC., agreed to review all project documents submitted to the Plaintiff, PINELLAS COUNTY, from the Defendant, INTERPACE CORPORATION, but subsequently failed to review such documents;

(D) Failed to specify, to perform, or to have performed, sufficient inspection and testing of materials used in the manufacture of the pipe to ensure the pipe would be manufactured and delivered as required by the specifications; failed to inquire of the Defendant, INTERPACE CORPORATION, of the use of admixtures that were used in the manufacture of the pipe, and by having no knowledge of the use of admixtures failed to approve, or to inspect the use of, admixtures; failed to require the Defendant, INTERPACE CORPORATION, to perform any additional tests not specifically mentioned in the standards and specifications, but necessary to ensure the quality and safety of the manufactured pipe; and failed to require that test results of the pipe manufacturing contractor and affidavits or certifications of compliance by the pipe manufacturing contractor be supplied for review as directed in the INTERPACE CORPORATION contract and AWWA specifications. As a result, materials were used in the manufacture of the pipe, and manufactured pipe was provided, which did not meet specification requirements;

(E) Certified completion of the project to the Plaintiff, PINELLAS COUNTY, without receiving affidavits and certifications of compliance. As a result of this negligence, the Plaintiff, PINELLAS COUNTY, was misled into believing that the pipeline was manufactured using materials and practices which complied in all respects with the standards and specifications;

(F) Failed to specify, to direct, to perform, or to have performed, adequate quality control tests on the manufactured pipe, which negligence included, but is not limited to, failure to detect that the pipe was being manufactured with materials which did not meet the design assumptions or the project specifications; failure to detect that the pipe was being manufactured with wire which contained serious seams and which was grossly susceptible to pitting, hydrogen embrittlement, and stress corrosion cracking as a result of defects formed during manufacture, that molds or forms were not correctly aligned during concrete pouring operations resulting in the cores of the pipes not meeting specified thicknesses, thereby causing stresses within the pipe greater than those for which it was designed, and failure to detect that the coating did not, in all cases, meet specified minimum thickness and composition requirements; failure to detect improper consolidation and non-uniformity of the coating; failure to detect that the mortar coat-

ing was being damaged and was separating during the manufacturing operation; failure to detect inadequate curing; failure to detect contamination of coating materials and precast cores; failure to detect defective coating patches; failure to detect insufficient core thicknesses and out-of-round steel cylinders; failure to detect improper cylinder welding procedures; failure to detect improperly stored corroded wire; failure to detect delaminated coating; failure to detect carbonation of the concrete cores, failure to detect non-uniform slurry application; and failure to detect that application of the cement slurry prior to the coating of the prestress wire was erratic, resulting in areas of unknown location throughout the pipeline which are highly susceptible to corrosion of the prestress wires and which have reduced safety factors, reduced durability, and which will ultimately lead to premature failure of the pipeline;

(G) Failed to provide proper inspection of the subject pipe during its production at the manufacturer's plant in Lacoochee and failed to detect the generally inadequate and negligent quality control situation at the pipe manufacturing plant. Furthermore, the Defendant, CH2M HILL SOUTHEAST, INC., failed to advise the Plaintiff, PINELLAS COUNTY, of the need for part-time or full-time in-plant inspections during the time the pipe was manufactured, and further failed to advise the Plaintiff, PINELLAS COUNTY, of the need to provide funds for these in-plant inspections;

(H) Failed to specify acceptance inspection procedures adequate to identify defective pipe. In addition thereto, the Defendant, CH2M HILL SOUTHEAST, INC., failed to inspect the work properly; failed to identify incorrect pipe loading and unloading techniques; failed to require the Defendant, INTERPACE CORPORATION, to provide samples and specimens of pipe manufacturing materials as provided for in the standards and specifications; failed to examine and test said material samples and specimens; and failed to require the Defendant, INTERPACE CORPORATION, to provide an affidavit and certification of compliance at the end of the project;

(I) Failed to require proper repairs to pipe damaged during transportation or installation;

(J) Failed to investigate "Class IV", 8-gauge wire sufficiently before approving of such wire to be used in the manufacture of the subject pipeline; failed to review available test data

for "Class IV", 8-gauge wire or to contact competent wire manufacturers; and failed in permitting the use of "Class IV", 8-gauge wire, failed to require said wire to undergo adequate testing, including torsion testing, hydrogen embrittlement testing, and stress corrosion cracking testing, before acceptance;

(K) Failed to detect that the pipe coating material was mortar rather than concrete as required in the specification;

(L) Failed in their design of the system to provide for sufficient flexibility which would allow the Plaintiff, PINELLAS COUNTY, to operate the subject pipeline in the future at working pressures up to 150 psi which may be needed for future water system operation;

(M) Failed to design the system to include a sufficient surge pressure margin or surge protection facilities adequate for the surges to which the pipeline is being, and will be, subjected during its operation;

(N) Failed to design the surge protection facilities properly which were provided. Specifically, of those air and vacuum valve assemblies which were specified and installed, the design was such that, when installed, many of the assemblies were flooded by groundwater and surface water. This rendered them unsuitable for the use intended, of mitigating surges and protecting the pipeline against water hammer damage. Furthermore, this endangered the health and safety of the Plaintiff's customers by exposing them to the probability that polluted water would be drawn into the potable water system and supplied to the Plaintiff's customers. As an additional result, the Plaintiff, PINELLAS COUNTY, suffered the added expense and inconvenience of redesigning and reinstalling said air and vacuum valves above ground so as not to be affected by the groundwater table and surface runoff waters;

(O) Failed to take into consideration and to design to prevent the probability that surges would be induced in the pipeline due to the operation and interaction between the Cypress Creek Pump Station, S.K. Keller Pump Station, and North Booster Station; all three stations, plus the interconnecting piping, having been designed by the Defendant, CH2M HILL SOUTHEAST, INC., prior to the design of the pipeline; failed to forewarn the Plaintiff, PINELLAS COUNTY, that the operation, or modification to operation, of pumps; motors, drives, valves, actuators, and other appurtenances in the above-mentioned pump stations, when

acting individually or together, could result in damaging surges being introduced into the pipeline; and failed to design, recommend, or advise as to the need for instrumentation to monitor for surges which could damage said pipeline, and which could be produced by the operation or interaction between these three pump stations;

(P) Failed in drafting the PINELLAS COUNTY/INTERPACE CORPORATION contract, which was ultimately signed, to require the Defendant, INTERPACE CORPORATION, to provide all test results as required to be performed under AWWA C-301-72; failed to require an affidavit and certification of compliance as provided for in AWWA C-301-72; failed to provide provisions in the contract that would give a sufficient warranty period by specifying only a one-year warranty period; and failed to provide a proper protection clause and recourse against the Defendant, INTERPACE CORPORATION, in the event that a defective product was supplied;

(Q) Failed to inform the Plaintiff, PINELLAS COUNTY, of its knowledge and understanding that the pipeline would only be expected to last approximately fifty years, while the Defendant, INTERPACE CORPORATION, consistently maintained the pipeline would last either indefinitely or at least one hundred (100) years;

(R) Failed to exercise due care in reviewing submittals from the Defendant, INTERPACE CORPORATION, which submittals described the prestressed concrete pressure pipe the Defendant, INTERPACE CORPORATION, intended to manufacture. By its failure to properly review these submittals, the Defendant, CH2M HILL, SOUTHEAST, INC., allowed the Defendant, INTERPACE CORPORATION, to manufacture a lesser quality pipe than was called for in the specifications. In so doing, the Defendant, CH2M HILL SOUTHEAST, INC., negligently failed to discharge its obligation to require the Defendant, INTERPACE CORPORATION, be held to the strict standards called for, and thereby failed to discharge its responsibility to the Plaintiff, PINELLAS COUNTY;

(S) Failed to reject shop drawings submitted by the pipe manufacturer, Defendant, INTERPACE CORPORATION, which included the specification of ASTM 648-73 which in turn permitted, or in the alternative, is claimed to have permitted by

Defendant, INTERPACE CORPORATION, the use of "Class IV" wire since the specification of ASTM 648-73 does not include within its specification an upper tensile limit for Class III wire. In turn, the Defendant engineer was permitting the use of a class of wire not provided in the original specifications and contracts and a class of wire which was totally different in kind than Class III wire, with a higher tensile strength than contemplated by the standard which sanctioned Class III wire; and

(T) Failed to require the Defendant, INTERPACE CORPORATION, to meet the requirements of the contract specifications contained in Plaintiff's Exhibit "A" and in Section 1.9 of AWWA C-301-72, requiring the provision of wire test specimens and other steel test specimens to the purchaser or its agent.

67. As a direct and proximate result of the negligence of the Defendant, CH2M HILL SOUTHEAST, INC., the Plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars as more particularly described in Paragraph 14.

COUNT X
BREACH OF CONTRACT OF CH2M HILL SOUTHEAST, INC.

68. The Plaintiff, PINELLAS COUNTY, realleges and reavers Paragraphs 1 through 14, Count I, above.

69. The Plaintiff, PINELLAS COUNTY, realleges and reavers Paragraphs 64 through 67, inclusive, Count IX, above.

70. The Defendant, CH2M HILL SOUTHEAST, INC., breached its contract with the Plaintiff, PINELLAS COUNTY, in the manner described in Paragraph 66.

71. The Plaintiff, PINELLAS COUNTY, has performed all conditions precedent required under the contract, Plaintiff's Exhibit "B".

72. As a direct and proximate result of the breach of contract by the Defendant, CH2M HILL SOUTHEAST, INC., the Plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars as more particularly described in Paragraph 14.

WHEREFORE, the Plaintiff, PINELLAS COUNTY, sues the Defendant, CH2M HILL SOUTHEAST, INC., for damages in a sum in excess of Sixteen Million Dollars plus prejudgment interest and costs of this action.

JOHN T. ALLEN, JR., of
JOHN T. ALLEN, JR., P.A.
4508 Central Avenue
St. Petersburg, FL 33711
(813) 321-3273
Attorney for Plaintiff,
PINELLAS COUNTY
SPN00039379
Florida Bar #1284

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail hand-delivery to G. LEE GARRETT, JR., ESQUIRE, 3300 First Atlanta Tower, Atlanta, Georgia, 30383; by U.S. Mail to: / STEPHEN BULL, ESQUIRE, Suite 1200, 111 North Orange Avenue, Orlando, Florida, 32801; by hand-delivery to: JEFFREY S. O'BRIEN, ESQUIRE, P.O. Box 3542, St. Petersburg, Florida 33731; and /by U.S. Mail to: MICHAEL J. KEANE, ESQUIRE, P.O. Box 31687, St. Petersburg, Florida 33732-1687 this 25th day of May, 1988.

JOHN T. ALLEN, JR., of
JOHN T. ALLEN, JR., P.A.
4508 Central Avenue
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(813) 321-3273
Attorney for Plaintiff/
PINELLAS COUNTY
SPN00039379
Florida Bar #1284

APPENDIX N

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT IN AND
FOR PINELLAS COUNTY, FLORIDA

CASE NO: 83-13313-8

PINELLAS COUNTY, FLORIDA

Plaintiff,

vs.

INTERPACE CORPORATION and
CH2M HILL SOUTHEAST, INC.,

Defendants.

MOTION TO STRIKE ALLEGATIONS IN PLAINTIFF'S
FIRST AMENDED COMPLAINT

COMES NOW the Defendant, CH2M HILL SOUTHEAST, INC., by and through its undersigned attorneys, and moves to strike allegations in the Plaintiff's First Amended Complaint, and as grounds therefore would show unto the Court the following:

1. The following phrases should be stricken from paragraph 5(b) of the Plaintiff's First Amended Complaint:

a. "The investigation of above-ground and below-ground chemical, physical, soil, ground water and electrical conditions and their potential effects on the materials selected for the component parts of the pipeline;"

b. "and to require special examination or testing of the work."

Phrase "a" above should be stricken because under Item D(2) of CH2M Hill's contract with the Plaintiff, such services were to be

provided by CH2M Hill only if authorized in writing by the Plaintiff to perform those services; however, no such written authorization was ever given to CH2M Hill by the Plaintiff. Phrase "b" above should be stricken from the Plaintiff's First Amended Complaint because in the last paragraph of Item B of CH2M Hill's contract with the Plaintiff, the duty to test materials is specifically excluded from CH2M Hill's obligations.

2. All of the allegations in paragraph 66(A) of the Plaintiff's First Amended Complaint should be stricken because the allegations refer to the failure of CH2M Hill to provide soil engineering services which under Item D(2) of CH2M Hill's contract with the Plaintiff are to be provided by CH2M Hill only if authorized in writing by the Plaintiff. However, the Plaintiff never gave CH2M Hill written authorization to perform such services.

3. All references to CH2M Hill's failure to perform, have performed, or direct properly any type of soil testing, should be stricken from paragraph 66(B) of the Plaintiff's First Amended Complaint. Under Item D(2) of CH2M Hill's contract with the Plaintiff, such services were to be provided by CH2M Hill only if authorized in writing by the Plaintiff; however, the Plaintiff never gave CH2M Hill written authorization to perform such services.

4. All references to CH2M Hill's failure to test, or to have tested, materials should be stricken from paragraph 66(D) of the Plaintiff's First Amended Complaint pursuant to the last paragraph of Item B of CH2M Hill's contract with the plaintiff which specifically excludes the testing of materials from CH2M Hill's obligations.

5. All allegations in paragraph 66(F) of the Plaintiff's First Amended Complaint should be stricken because the allegations are based upon CH2M Hill's failure to test the materials. Under the last paragraph of Item B of CH2M Hill's contract with the Plaintiff, the duty to test materials is specifically excluded from CH2M Hill's obligations.

6. All allegations in paragraph 66(G) of the Plaintiff's First Amended Complaint should be stricken because the allegations refer to CH2M Hill's failure to inspect the pipe during its production at the manufacturer's plant and its failure to advise the Plaintiff of the need for in-plant inspections. However, CH2M Hill had no contractual obligation to perform, or was not authorized to perform, any such services.

7. All allegations in paragraphs 66(H) of the Plaintiff's First Amended Complaint which refer to CH2M Hill's failure to inspect the work, to identify incorrect work, or to test materials should be stricken. Under the last paragraph of Item "B" in CH2M Hill's contract with the Plaintiff, CH2M Hill's obligation to test the materials is specifically excluded. Under Item "C" of CH2M Hill's contract with the Plaintiff, CH2M Hill was required to make on-site observations of the work and progress and field checks of materials and equipment only if authorized in writing by the Plaintiff; however, the Plaintiff never gave CH2M Hill such written authorization.

8. All allegations in paragraph 66(I) of the Plaintiff's First Amended Complaint should be stricken because the allegations are based upon CH2M Hill's failure to make field checks of materials. Under Item C of CH2M Hill's contract with the Plaintiff, CH2M Hill was to provide such services only if authorized in writing by the Plaintiff. However, the Plaintiff never gave CH2M Hill such written authorization.

9. All allegations in paragraph 66(K) of the Plaintiff's First Amended Complaint should be stricken because the allegations are based upon CH2M Hill's failure to test the materials. Under the last paragraph of Item B of CH2M Hill's contract with the Plaintiff, the duty to test materials is specifically excluded from CH2M Hill's obligations.

WHEREFORE, the Defendant, CH2M Hill, respectfully requests that this Court enter an Order striking the above-mentioned matters from the Plaintiff's First Amended Complaint.

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail this 8th day of September, 1988, to JOHN T. ALLEN, JR., ESQ., 4508 Central Avenue, St. Petersburg, FL 33711; G. LEE GARRETT, JR., ESQ., 3300 First Atlanta Tower, Atlanta, GA 30383; JEFFREY S. O'BRIEN, ESQ., P.O. Box 3542, St. Petersburg, FL 33731; and MICHAEL J. KEANE, ESQ., P.O. Box 31687, St. Petersburg, FL 33732.

STEPHEN A. BULL
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Suite 1200
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Orlando, FL 32801
(407) 843-5291
Attorneys for Defendant
CH2MM Hill Southeast, Inc.

SAB/lkr
108-024

APPENDIX O

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

CIRCUIT CIVIL NO. 83-13313-08

PINELLAS COUNTY,

Plaintiff,

-vs-

INTERPACE CORPORATION and
CH2M HILL SOUTHEAST, INC.,

Defendants.

_____/

ORDER ON DEFENDANT, CH2M HILL'S MOTION TO STRIKE ALLEGATIONS IN PLAINTIFF'S FIRST AMENDED COMPLAINT

THIS CAUSE came on to be heard on the Motion to Strike Allegations in Plaintiff's First Amended Complaint, and the Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that

1. The Motion to Strike is hereby denied.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 16 day of October, 1988.

/s/ FRED L. BRYSON
Circuit Court Judge

Copies Furnished To:

John T. Allen, Jr., Esquire
Michael J. Keane, Esquire
Jeffrey S. O'Brien, Esquire
G. Lee Garrett, Jr., Esquire
Stephen M. Bull, Esquire
John R. Bush, Esquire

APPENDIX P

(SEAL OMITTED)

CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
STATE OF FLORIDA

FRED L. BRYSON
CIRCUIT JUDGE

PINELLAS COUNTY JUDICIAL BUILDING
545 FIRST AVENUE NORTH
ST. PETERSBURG, FLORIDA 33701
TELEPHONE (813) 892-7733

September 26, 1989

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P.O. Box 31517
St. Petersburg, FL 33732-1517

Stephen M. Bull, Esq.
Bull and Mize
111 No. Orange Avenue
Suite1200
Orlando, FL 32801

Re: Pinellas County vs. Interpace Corp. et al.

Gentlemen:

Please be advised that Motions for Directed Verdict are denied.

Further, be advised that beginning October 10th we will commence working at 9:00 A.M. and continue until 9:30 P.M., Monday through Thursday.

Lunch hour will be from 12:00 Noon to 1:15 P.M.

Dinner hour will be from 5:00 P.M. to 6:15 P.M.

I have canceled my attendance at the judges' conference and will be in attendance here during the week of October 16th. The above schedule will be continued during that week and every day thereafter until the trial is finished.

Please be governed accordingly.

Sincerely,

Fred L. Bryson

FLB:mb

APPENDIX Q

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

PINELLAS COUNTY, FLORIDA

Plaintiff,

vs. CASE NO.: 83-133313-8

INTERPACE CORPORATION;
CLEVEPAK CORPORATION;
AND MADISON MANAGEMENT
GROUP, INC., AS SUCCESSORS
OF INTERPACE CORPORATION;
AND CH2M HILL SOUTHEAST,
INC.,

Defendants.
_____/

ORDER DENYING MOTION TO DISQUALIFY

This case came on to be heard on the motions of Defendant, Madison Management Group, Inc. and the Defendant, CH2M Hill Southeast, Inc. for disqualification of the undersigned judge. Both of said Defendants, as a part of their motions, included a summary of what they conceived to be the relevant facts and law involved. The Plaintiff, Pinellas County, filed its Memorandum of Law in opposition to the Motions for Disqualifications. The Court has carefully considered both of said motions as well as the Plaintiff's Memorandum.

The nonjury trial of this case began on January 17, 1989 and has continued until the present time. Thousands of pages of testimony have been taken from numerous witnesses. The Parties, both Plaintiff and Defendant, have spent hundreds of thousands of dollars in expert and nonexpert witness fees, attorneys fees, and other costs, and the trial of this case has consumed substantially all of the time of the judge and other court officials since the beginning. The

disqualification of this judge will necessitate a new trial of this case from its very inception, and all of the moneys expended by the parties and all of the public monies expended will go for naught.

The Court must assume that the motions and the memoranda filed by the movants were filed in good faith and that the moving Defendants believe that the trial judge is prejudiced against them, as alleged in the motions. All of this creates an unfortunate situation from the standpoint of the parties, their attorneys, and the Court. The trial of this case is drawing to a conclusion. Because of all of the foregoing facts, the Court has given great consideration to the motions of the moving Defendants and to the memorandum of the Plaintiff, Pinellas County.

The Court finds that the motions and the supporting affidavits filed by the moving Defendants are legally insufficient. The motions are largely based on the conduct of the trial judge during the course of the trial during the questioning of many of the witnesses. It may be that some of such conduct constituted judicial error prejudicial to the moving Defendants. If so, this will undoubtedly be pointed out to the appropriate Appellate Court by those Defendants, if any, who do not prevail in this case. Although the Court believes that some of the quoted portions of the Court's comments are taken out of context and that a reading of the entire testimony of the witness will reflect that the Court's conduct in this regard was not erroneous, the Court must take said quoted portions of said testimony as true and the Court does so. It is the view of the Court, however, that said conduct, as so reflected, does not exhibit any prejudice or bias either for or against any of the parties to this cause and, therefore, is legally insufficient to warrant disqualification.

The Court further finds that if some of the conduct of the Court alleged in the motions warranted a belief that the judge was prejudiced or biased for or against any of the parties, the moving Defendants, by failing to object thereto promptly in some instances, and in other instances by failing to timely file their motions to disqualify the judge, waived their rights to do so.

On October 10, 1989, the trial of this case was set to continue with the taking of evidence. A conference was held in the chambers of the judge. At said conference, counsel for CH2M Hill Southeast, Inc. announced that he desired to file a motion, without designating the nature of the motion. The Court requested a copy

of the motion which request was not complied with and counsel for said Defendant requested that the conference in chambers adjourn and that the case go forward in the courtroom, to which request the trial judge acceded. When the trial was convened in the courtroom, which had an unusually large number of people present, counsel for CH2M Hill Southeast, Inc., for the first time, handed the judge the Motion to Disqualify and immediately launched into his argument on the motion, which argument was extensive and contained substantially all the matter alleged in the Motion to Disqualify.

At the conclusion of said argument, the judge asked counsel for the Defendant, Madison Management Corporation, Inc. if his client desired to join in the motion of the Defendant, CH2M Hill Southeast, Inc., and was advised that counsel would have to discuss the matter with his client. The matter was then set for hearing on the Defendant CH2M Hill's motion for the following morning, and the court was recessed.

Prior to the Court reconvening the following morning, the trial judge carefully read and considered the pending Motion for Disqualification, and the manner in which it was presented, and the Court concluded that counsel for CH2M Hill deliberately contrived a means to attack the Court's integrity openly and before a large segment of the public without affording Plaintiff's counsel an opportunity to question the validity of said counsel's attack and, of course, with the trial judge having no opportunity to defend himself. The trial judge further concluded that said conduct on the part of defense counsel was an attempt to goad the trial judge into making intemperate remarks which might afford defense counsel an opportunity to have the judge recused because of prejudice on the part of the trial judge against said counsel.

The Court convened the following morning, October 11, 1989 in the open courtroom for the purpose of hearing arguments on the then pending Motion to Disqualify. The trial judge suggested to counsel for CH2M Hill that he did not believe the Motion to Disqualify was filed in good faith and afforded counsel an opportunity to withdraw said motion. Upon the declination of CH2M Hill to withdraw the motion, the Court made some intemperate remarks relative to the good faith and ethics of Mr. Schooley, counsel for the corporation. Thereafter, Madison Management Group, Inc. filed its Motion to Disqualify the judge and proceeded briefly

to argue the same in the courtroom. At the conclusion of the brief argument, the Court recessed until the following Monday morning at which time the Court would hear argument by the moving Defendants and the Plaintiff relative to said Motions to Disqualify.

The statute for disqualification of judges for prejudice or bias pertains to prejudice or bias for or against the parties in the litigation and not their lawyers. There are numerous Florida cases holding that the prejudice of the trial judge against the lawyer of a party might be of such degree or character as to rob the judge of that degree of impartiality required by law. The Court is of the view that in the middle of an extremely length trial a lawyer cannot deliberately provoke an incident calculated to anger the judge against the lawyer, and then based thereon seek to disqualify the judge from proceeding further.

The Court has seriously considered his attitude toward the parties themselves in this case and does not believe that he has been, is, or will be, prejudiced for or against any of them. He regrets that he made intemperate remarks to Mr. Schooley, counsel for CH2M Hill, and through this Order assures all of the parties that they will receive a fair and impartial trial despite any feelings which he might have had toward Mr. Schooley, personally.

IT IS THEREUPON ORDERED AND ADJUDGED that:

The motions of the Defendants, Madison Management Group, Inc., and CH2M Hill Southeast, Inc. for disqualification of the undersigned judge be and the same are hereby denied.

DONE AND ORDERED at St. Petersburg, Florida, this 17 day of October, 1989.

_____

Circuit Judge

Copies furnished to:

Jeffrey S. O'Brien, Esq.
Stephen M. Bull, Esq.
G. Lee Garrett, Jr., Esq.
Michael J. Keane, Esq.
John T. Allen, Jr., Esq.
Lynn Hamilton Cole, Esq.

APPENDIX R

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

OCTOBER 27, 1989

CH2M HILL SOUTHEAST, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 89-02918
	)	CIR. CASE NO. 83-13313-08
HONORABLE FRED L. BRYSON,	)	
Circuit Judge of the Sixth	)	
Judicial Circuit,	)	
	)	
Respondent.	)	

Counsel for petitioner having filed a petition for writ of prohibition, upon consideration, it is

ORDERED that the petition is hereby denied.

DANAHY, A.C.J., and HALL and THREADGILL, JJ., Concur.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Ralph C. Dell, Esquire
Lynn Hamilton Cole, Esquire
Stephen M. Bull, Esquire
Steven R. Schooley, Esquire
State Attorney
Attorney General
John T. Allen, Jr., Esquire
Michael J. Keane, Esquire
G. Lee Garrett, Jr., Esquire
Jeffrey S. O'Brien, Esquire
Honorable Fred L. Bryson

/DM

APPENDIX S

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

OCTOBER 27, 1989

MADISON MANAGEMENT GROUP, INC.,	)	
Petitioner,	)	
v.	)	CASE NO. 89-02916
	)	CIR. CASE NO. 83-13313-08
HONORABLE FRED L. BRYSON, Circuit Judge of the Sixth Judicial Circuit,	)	
Respondent.	)	

Counsel for petitioner having filed a petition for writ of prohibition, upon consideration, it is

ORDERED that the petition is hereby denied.

DANAHY, A.C.J., and HALL and THREADGILL, JJ., Concur.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Ralph C. Dell, Esquire
Lynn Hamilton Cole, Esquire
Stephen M. Bull, Esquire
Steven R. Schooley, Esquire
State Attorney
Attorney General
John T. Allen, Jr., Esquire
Michael J. Keane, Esquire
G. Lee Garrett, Jr., Esquire
Jeffrey S. O'Brien, Esquire
Honorable Fred L. Bryson

/DM

APPENDIX T

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

MARCH 8, 1990

CH2M HILL SOUTHEAST, INC.,

Petitioner,

v.

Case No. 89-03171
Cir. Civ. 83-13313-8

HONORABLE FRED L. BRYSON,
Circuit Judge, Sixth Judicial Circuit,

Respondent.
_____/

Counsel for petitioner having filed a Petition for Writ of Prohibition, upon consideration, it is ordered that the petition is hereby denied.

Pinellas County's motion to strike is denied.

HALL, A.C.J., THREADGILL, and PATTERSON, JJ., Concur.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Ralph C. Dell, Esq.
and Lynn Hamilton Cole, Esq.
Stephen M. Bull, Esquire
Attorney General
Richard T. Earle, Jr., Esq.
G. Lee Garret, Jr., Esq.
State Attorney
Hon. Fred L. Bryson

Jeffrey S. O'Brien, Esq.
Michael J. Keane, Esquire
Richard L. Ake, Clerk
John T. Allen, Jr., Esq.
Raymond T. Elligett, Esq.

/BB

APPENDIX U

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

MARCH 8, 1990

CH2M HILL SOUTHEAST, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 89-02918
	)	
HONORABLE FRED L. BRYSON, Circuit Judge of the Sixth Judicial Circuit,	)	
	)	
Respondent.	)	

Petitioner having filed a motion for rehearing and rehearing en banc in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Ralph C. Dell, Esquire
Lynn Hamilton Cole, Esquire
Stephen M. Bull, Esquire
State Attorney
Attorney General
Michael J. Keane, Esquire

John T. Allen, Jr., Esquire
G. Lee Garrett, Jr., Esquire
Jeffrey S. O'Brien, Esquire
Honorable Fred L. Bryson

APPENDIX V

Excerpts from Findings of Fact, Conclusions of Law, and Final Judgment for Plaintiff, Pinellas County

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

Circuit Civil No. 83-13313-08

PINELLAS COUNTY,

Plaintiff,

vs.

INTERPACE CORPORATION,
CLEVEPAK CORPORATION,
AND MADISON MANAGEMENT
GROUP, INC., AS SUCCESSORS
OF INTERPACE CORPORATION;
AND CH2M HILL SOUTHEAST,
INC.,

Defendants.
_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT FOR PLAINTIFF, PINELLAS COUNTY

THIS CAUSE is before the Court for determination upon Plaintiff, PINELLAS COUNTY's, First Amended Complaint claiming that a thirteen and one-half mile segment of its major water transmission main made of 54-inch and 60-inch diameter prestressed concrete pipe is defective and should be replaced. The prestressed concrete pipe was manufactured during 1977 and 1978 by a nationally known pipe manufacturer known as Interpace Corporation. On May 3, 1985 Interpace Corporation changed its name to Madison Management Group, Inc. In July of 1987, Clevepak Corporation merged with Madison Management Group, Inc. Therefore, the Defendant, MADISON MANAGEMENT GROUP, INC., is properly before the Court as a successor to INTERPACE CORPORATION and throughout the remainder of these Findings will be referred to as "INTERPACE".

In March of 1975 Pinellas County executed an agreement with a consulting engineering firm known as Black, Crow and

Eidsness, Inc. to design the pipeline, select the pipeline's route, draw all contracts necessary to the letting of bids including contracts with the pipe manufacturer, test the materials which were to be used in the manufacturing of the prestressed pipe, and to sufficiently inspect the pipe as it was being manufactured and after installation. The engineer's main charge was to protect Pinellas County against improper manufacturing and installation of the pipeline. (Footnote omitted) After the pipeline's construction, Black, Crow & Eidsness, Inc. (BC&E) changed its name to CH2M Hill Southeast, Inc. Throughout the remainder of these Findings the Defendant engineer will be referred to as "CH2M HILL".

In sum, the individual pieces of prestressed concrete pipe, both 54-inch and 60-inch in diameter, were to be manufactured by Interpace at its Lacoochee plant (footnote omitted) located in Lacoochee, Pasco County, Florida, who would in turn deliver the pipe to Suwanee Transfer and Storage, Inc. for hauling to the laying site (footnote omitted) to be installed by another contractor known as Bumby & Stimpson, Inc. (Footnote omitted) CH2M Hill's contractual obligation was to design the pipeline, review and approve the plans and specifications submitted by Interpace for the construction of the pipe, review certain component part tests which were to be submitted by the manufacturer, Interpace, draw the contract between Pinellas County and Interpace, and to certify to Pinellas County that the pipeline had been constructed according to the plans and specifications. There are other contractual duties assumed by CH2M Hill which will be referred to in these Findings which bear upon the questions of breach of contract and negligence CH2M Hill.

The Court started hearing testimony in the case on January 17, 1989, with testimony having been concluded on January 24, 1990. There have been 131 days of trial during this time. This case is purported to be one of the longest if not *the* longest case ever heard in Florida. There have been 1,567 exhibits admitted into evidence.

As trier of the facts, the Court has been required to learn and apply a substantial number of engineering and water production disciplines including metallurgy, wire making and drawing, the manufacture of large diameter prestress pipe, pipeline design, pipeline testing, the mathematical formulas associated with the pipeline manufacture and design, hydraulics, structures, petro-

graphics (the study of concrete and mortar), chemistry (as applied to groundwater, metallurgy and petrographics), corrosion, principles of water supply to a large populated county, statistics and population forecasting, computer programs depicting a water supply system, and interpretation and application of the national standard for manufacturing prestressed pipe known as AWWA C301-72 and various American standards testing metallurgical standards applicable in the case such as ASTM A227-71 and ASTM A648-73.

The County has sued the manufacturer Interpace upon several legal theories for providing to Pinellas County a prestressed concrete pipeline which does not have the specified operating pressure of 150 psi and surge pressure of 210 psi, and which is otherwise claimed defective in not complying with the specifications for manufacture of the pipe. Punitive damages are also sought from Interpace based upon the theories of fraud, strict liability in tort, and willful and wanton misconduct. Pinellas County has also sued its engineer whose duty was to protect the County from the manufacturer providing pipe which failed to meet the specified and the required pressure rating and defective pipe. Damages for the cost of the replacement of the pipeline are sought from both Defendants. Pinellas County also sues CH2M Hill for the cost of coal tar epoxy coating the pipeline which the County asserts should have been included by the engineers in the specifications because of aggressive soil and groundwater attack to which the present pipeline is being subjected. In addition, Pinellas County has sued CH2M Hill for improperly designing certain vacuum relief valves at below ground level in vaults along the pipeline, claiming it was necessary to raise the valves above ground level to prevent the contamination of the pipeline with groundwater which had accumulated in the vaults. The County claims that the valves would not operate properly to prevent surges in the line when filled with water. Pinellas County claims further damages for replacement of burst pipe, failed tapped pipe and leaking pipe. After serious consideration and deliberation, the Court finds for the Plaintiff, Pinellas County, and against the Defendants on all counts.

...

I. FINDINGS OF FACTS

A. THE IMPORTANCE AND LOCATION OF THE PIPELINE

Pinellas County imports a substantial portion of its water supply from neighboring counties. The County is a member of the West Coast Regional Water Supply Authority whose task is to implement a regional water supply concept whereby the Authority would supply water to its municipal and county members in Hillsborough County, Tampa, Pasco County, City of St. Petersburg, and Pinellas County. The Water Authority operates a wellfield known as the Cross Bar Ranch Wellfield located in Pasco County. Water from this wellfield is transmitted through a 60-inch diameter transmission line south to the Cypress Creek Pump Station. The Cypress Creek Pump Station and wells are also owned by the Water Authority. Water from both the Cross Bar Ranch and Cypress Creek Wellfields are transmitted from the Cypress Creek Pump Station south through an 84-inch diameter prestressed concrete pipeline, which in turn reduces to a 66-inch diameter line. In turn a 42 and 54-inch diameter transmission line are connected to the main 66-inch line at the Pasco-Pinellas County line. The 42-inch transmission main is intertied to the main 54-inch line by a 24-inch in diameter main, and also to a main at the Keller Pump Station. The 54-inch transmission main discharges into a 60-inch transmission line that runs further south. This interconnection was constructed to give flexibility in operating the water system to the Pinellas County water director and can be closed sending all water coming down the 84-inch and 66-inch diameter transmission lines south through the 54 and 60-inch transmission lines to the 580 North Booster Station. (Footnote omitted) Water is supplied to Pasco County through a main 30-inch's in diameter at U.S. 19 at the Pasco/Pinellas county line. Thus, the 60-inch diameter transmission line begins at the "interconnection" from the 42-inch and 54-inch main and runs south to the North (State Road 580) Booster Station located just north of the juncture of State Road 580 and U.S. Highway 19. There are bypass facilities at the North Booster Station which would permit all water flowing from the 60-inch transmission line, to bypass completely the 580 booster pumping facilities. (Footnote omitted) There are other transmission lines which run from the Eldridge-Wilde Wellfield and into the North

Booster Station which are minimally related to these proceedings. For a complete pictorial understanding of the transmission system, see Exhibit "A" to this judgment which is consistent with Exhibit 12 in evidence. (Footnote omitted)

When the Pinellas County Water System is viewed as a whole, the transmission line which is the subject of this litigation is the most critical section of the Pinellas County Water System. (Footnote omitted) It transmits water from all three major wellfields. The line is so critical to the adequate supply of water to the Pinellas County population that the line cannot be taken out of service except under extreme emergencies and then for only a very short period of time. (Footnote omitted) The volume of water needed on a daily basis by Pinellas County cannot be met without the line being in service, especially during peak demand days and dry seasons. (Footnote omitted) Elimination of the use of the line for any unreasonable or substantial period of time would cause a water emergency, water crisis and at least water rationing. (Footnote omitted) These facts were well known to both CH2M Hill and Interpace at the time the lines were designed and manufactured. (Footnote omitted) Therefore, both Interpace and CH2M Hill knew the critical nature of the line and that the pipeline had to be constructed without material defects in the pipe. Both Defendants knew or should have known by the nature and location of the pipeline that each pipe had to be dependable and reliable (footnote omitted) much like the wing of an airplane.

Even worse is the potential of "backflow". (Footnote omitted) "Backflow" occurs when the water system is not able to supply the required water to a given area thereby causing a negative pressure to occur in the water distribution lines. (Footnote omitted) This negative pressure draws water into the water distribution lines and ultimately into the water transmission lines and contamination from septic tanks, toilets, and other pollution, etc. occurs. (Footnote omitted) "Backflow" creates a substantial health hazard. (Footnote omitted) When "backflow" occurs the lines must be flushed, disinfected and sampled before potable water can again be supplied to the public. (Footnote omitted) In view of the substantial increase in water maximum day demands in Pinellas County from 100,000,000 MGD in 1987 to a projected 200,000,000 MGD by the year 2020, any failure on blowout of the pipeline in question could and probably would cause a catastrophe. (Footnote omitted)

Under such a threat it is clear that the public interest requires that the line in question be dependable and reliable. (Footnote omitted) Replacement of such a critical pipeline is in the mind of the trier of fact the only plausible solution. (Footnote omitted)

B. THE LONGEVITY OF A PROPERLY MANUFACTURED PRESTRESSED CONCRETE PIPELINE

The longevity of a properly manufactured pipe is applicable only in the context of the state of decay which the pipe is experiencing because of progressive corrosion mechanisms on the prestress wire. These corrosive mechanisms are ongoing and continuing in the pipeline. (Footnote omitted) The issue is not material on the question of whether the pipe was properly manufactured so that it can be used at the specified pressure of 150 psi working pressure and 210 psi surge pressure. In this context, the pipeline must be replaced because the pipe was not made to the specifications of 150 psi working pressure and 210 psi surge. (Footnote omitted) For this reason alone the County did not get what it bargained for even if there was no ongoing corrosion in the pipeline. (Footnote omitted)

The Court must make a factual determination of how long Pinellas County could reasonably expect the pipeline in question to last if properly manufactured and used without surging the line beyond its design limits. The best reasonable engineering evidence shows that a prestressed pipe should last more than 100 years or indefinitely. Interpace itself in a technical article written by Shaw who was the General Manager of Research and Development in 1965 published in *Civil Engineering*, this statement:

> The high capital investment involved in major pipeline systems demands that they be constructed of materials with maximum economic life. Reinforced and prestressed concrete have achieved increasing popularity as pipeline materials because of their demonstrated consistent longevity; steel encased in concrete will be protected and will preserve its structural integrity for centuries. **

(Plaintiff's Exhibit 17A in evidence)

The article concludes that prestressed pipe will have a very long life generally in excess of 100 years when buried in a natural occurring soil environment. Interpace's Vice President of Technology and former Chief Engineer, Bob Bald, testified properly manufactured prestressed pipe should last "*indefinitely*". (Footnote omitted) Expert engineers agree. (Footnote omitted) The salesman for Interpace prior to the letting of bids for the 60 and 54-inch project represented to Pinellas County and to CH2M Hill in brochures that Interpace pipe should last 100 years. (Footnote omitted) Advertisements of Interpace placed in *Civil Engineering - ASCE* and *Journal American Water Works Association* solicited engineers to specify Interpace prestressed concrete pipe because it would last as long as the Roman aqueducts. (Footnote omitted)

Cores from other prestressed pipe in the ground for many years which are not manufactured with Interpace Class IV wire have been examined and have been clean and totally free of rust. (Footnote omitted) Yet Pinellas County pipe has substantial major rust on prestressed wire on every pipe examined. (Footnote omitted) The Court believes the engineering experts who are of the opinion that the life span of prestressed concrete pipe is conservatively well over 100 years. (Footnote omitted) After considering all opinions and qualifications of the engineers and especially the materials which are required to be used in making the component parts of the pipe, Pinellas County should well have assumed it was purchasing pipe which would last more than a century and probably indefinitely barring any unusual circumstances. The greater weight of the evidence shows that from a serviceability and reliability standpoint the line has already failed. (Foonote omitted) All or a substantial number of pipe will prematurely burst if the line was continued to be used without replacement. (Footnote omitted) Each pipe excavated is in a far greater state of decay than would be the case if the pipe were properly manufactured. (Footnote omitted)

The position taken by CH2M Hill engineers that the pipeline should only last from 20 to 50 years (footnote omitted) is without engineering credibility. The engineer, CH2M Hill, never advised Pinellas County of the estimated 50 year life. (Footnote omitted) The Court believes the testimony of the former Water Director for Pinellas County who was in charge at the time the line was designed to the effect that he understood there was no limit as

to how long the pipe would last and had he been told that the pipe would only last for 50 years he would not have agreed to constructing the line with prestressed concrete pipe because of the lines' importance and because of its strategic location. (Footnote omitted)

Just after the Pinellas County pipeline had been constructed, the president of Interpace made a startling admission against interest by directing his second in command to "destroy all documents stating that Interpace pipe would last 100 years or more". (See Exhibit 24) The Court views this exhibit like any other normal trier of fact and completely construes this admission against Interpace. Through this document, Interpace has admitted that it found out that it was not properly manufacturing its pipe and had not constructed the Pinellas County pipe properly and for that matter all of its other pipe and that these pipes and the pipelines would *not* last 100 years or more as claimed by Interpace to Pinellas County officials and the engineering public long prior to the construction of the Pinellas County pipeline.

...

XIII. FINAL JUDGMENT

Based on the foregoing, it is HEREBY ORDERED AND ADJUDGED:

1. Judgment is hereby rendered in favor of Pinellas County and against Madison Management Group, Inc. for the total sum of $24,014,630.62 together with interest at the rate of twelve (12%) percent per annum for which sum let execution issue;

2. Judgment is hereby entered in favor of Pinellas County and against CH2M Hill Southeast, Inc. in the amount of $19,798,018.82 together with interest at the rate of twelve (12%) percent per annum for which sum let execution issue;

3. Judgment is reserved to tax costs against the defendants;

4. In addition, Pinellas County is hereby awarded its taxable costs against both defendants, Madison Management Group, Inc. and CH2M Hill Southeast, Inc. The Plaintiff is instructed to file within 30 days of the entry of this judgment, a Motion to Tax Costs. The Defendants are instructed to filed with the Court, within 30 days of service of Plaintiff's Motion to Tax Costs, its specified detailed objections to the claimed taxable costs of the Plaintiff, Pinellas County. The Court will then set an evidentiary hearing on the Motion to Tax Costs.

DONE AND ORDERED in St. Petersburg, Pinellas County, Florida this 6th day of June, 1990.

/s/ Fred L. Bryson
CIRCUIT JUDGE

Copies furnished to:

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Attorney for Plaintiff

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Thirty-Third Floor
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Atlanta, GA 30383-3101
Attorney for Interpace

APPENDIX W

Excerpts of the Initial Brief of Appellant CH2M HILL SOUTH-EAST, INC.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NOS. 90-2027 and 90-2028

MADISON MANAGEMENT GROUP, INC.,
and CH2M HILL SOUTHEAST, INC.,

Appellants,

v.

PINELLAS COUNTY, FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT CH2M HILL SOUTHEAST, INC.

On Appeal from a Final Judgment Entered in the Sixth Judicial Circuit, in and for Pinellas County, Florida

---

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Fla. Bar No. 172347

Arthur J. England, Jr., Esq.
Fla. Bar No. 022730

Guy S. Haggard, Esq.
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Charles M. Auslander, Esq.
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Fine Jacobson Schwartz Nash
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100 S.E. Second Street
Miami, Florida 33131
(305) 577-4000

Counsel for CH2M Hill

Summary of Argument

The trial judge was required to disqualify himself following the presentation of timely motions to disqualify made during the course of trial. The judge had engaged in actions during the trial, and made comments throughout the trial, which prejudiced Hill in the presentation of its case and created a reasonable fear in Hill's principals that the judge was biased in favor of the County. The motions for disqualification which were presented by hill were legally sufficient on their face. More-over, the trial judge made comments and took actions following presentation of the motions which mandated his disqualification. *E.g., MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla. 1990).

The trial judge erred as a matter of law imposing tort liability on Hill. The County neither alleged nor proved any tort independent of Hill's contractual duties; indeed, the County affirmatively identified Hill's alleged negligence by reference to its contractual obligations. In the absence of a tort independent of contractual duties, no tort recovery is permitted. *Lewis v. Guthartz*, 428 So.2d 222 (Fla. 1982). Nor is tort liability possible for a breach of statutes creating no private right of action and imposing obligations only on governmental agencies. In any event, tort liability against Hill cannot be sustained where, as here, there is only economic loss to the pipeline itself, with nominal (if any) damage to other property. Florida Power & Light Co. v. Westinghouse Electric Corp., 510 So.2d 899 (Fla. 1987); AFM Corp. v. Southern Bell Telephone and Telegraph Co., 515 So.2d 180 (Fla. 1987).

The trial court erred as a matter of law in finding Hill liable for breach of its engineering contract based on defects in the pipe segments manufactured by Interpace and as a result of Interpace's use of class IV wire in pipe segments. Hill segments being made by Interpace. Nor was the use of class IV wire by Interpace a breach of Hill's contract, since that type of wire was in conformity with AWWA C-301-72 standards that Hill had specified. The trial court's determination that the County's contract with Interpace "merged" with the Hill Contract so as to impose additional contractual duties on Hill is legally unsustainable.

The trial court's award of damages equivalent to the cost of replacing the entire 13.5 mile pipeline with improved components is not sustainable by law or by the evidence. Hill has no tort liabil-

ity whatsoever, and its obligation for breach of contract, if any indeed occurred, at most would warrant liability for the costs of repair. The entire pipeline had been operating as intended for twelve years at the time of trial, with only one in-service break. No competent substantial evidence was presented to sustain the trial court's conclusion that the entire pipeline must be dug up and replaced. Moreover, no theory of law authorized the trial judge to award damages for a new pipeline with improvements and betterments that had not been contracted for originally.

...

B. *Hill is not liable for breach of contract.*

The County's final judgment against Hill hinges on three alleged breaches of contract. For one thing, the court held that Hill had contracted to inspect the manufacture of pipe segments based on the County's contention that references to "contractor" and the "construction site" in the Hill Contract are not references to the pipeline installation process, but rather are references to the pipe segment manufacturing process. For another, the court held that Hill had contractual duties under the Interpace Contract — a document entered into between the County and Interpace nearly two years following execution of the Hill Contract — based on a theory of document "merger." The court additionally ruled that Hill had breached its contractual design responsibilities by allowing Interpace's use of class IV wire for the pipeline, and by underdesigning the operating pressure for pipe segments. None of these bases for finding a contract breach is supportable in the record of law.

1. *Hill had no contractual duty to inspect the manufacture of pipe segments.*

The trial court's final judgment concludes that Hill was required as part of its Item A design duties to perform engineering services in connection with the process of manufacturing pipe segments. There is no such directive in Item A of the Hill Contract. The trial judge was persuaded that the terms "contractor" and "construction site" in the Hill Contract were references to the pipe segment manufacturing process, rather than to the pipeline installation process. A plain reading of that document belies that interpretation, however, and the context of its drafting and execution confirms that the language used could only mean the contrary.

The language in Item A of the Hill Contract makes clear that Hill's design functions encompass duties relevant to the design of the pipeline system, not the manufacture of the pipe segments. For example, Item A-1 anticipated that Hill would consult regarding "property, boundary, right of way, topographic and utility surveys," each patently relating to the location of the pipeline. Consistently, Item A-3 called for Hill to draft specifications and schedules for the proposed improvements, meaning, of course, the pipeline system. (V. 128 at 19042).

References to "construction site" and "contractor" in Items A and B can only relate to installation of the pipeline. Item A-5 directs Hill to "advise prospective bidders, suppliers of construction materials, and equipment manufacturers." *Id.* at 19042. To "advise" *prospective* bidders, suppliers and equipment manufacturers could not have meant to inspect and oversee pipe segment manufacturing, for in 1975 when the Hill Contract was signed, there was no pipe segment manufacturer. None had even bid the job, let alone been selected to manufacture pipe segments.

In Item A-6, Hill was made responsible for "canvassing construction proposals, and [making] engineering recommendations in awarding of construction contract or contracts." *Id.* Use of the word "construction" in Item A-6 correlates with the identification of bidders, suppliers and manufacturers in Item A-5, relating to advisory services for *prospective* parties.

Just as plainly, Item B also identified services to be performed by Hill which related only to installation of the pipeline. All paragraphs in Item B discuss phases and features of procedures common to a contract between a consulting engineer on the one side, and an owner-general contractor on the other, such as visits to the construction site (Item B-1), preparation of routine change orders and stop work orders (Item B-4), recommendations regarding final acceptance of construction work (Item B-6), and completion of a set of prints for each construction contract changed during the construction process (Item B-7). Significantly, the concluding, unnumbered paragraph of Item B provided that Hill's professional services during construction were *not* to include "the testing of materials or the furnishing of resident project representatives, field engineers, and inspection personnel." It is impossible to reconcile the installation-oversight duties of Hill with an obligation to control the manufacturing process when the contract expressly exclud-

ed materials testing and furnishing inspection personnel.[22]

Item C of the Hill Contract proves the point further. The first paragraph of Item C proposes that Hill would furnish "resident engineer" services "to observe the *construction* work of the *contractor* on a daily basis." (Emphasis added). These services were to have included:

> field observation, inspection of materials and work, ... preparation of daily progress reports, monthly summaries...reviews, verifications and estimates for payments to contractors.

The County never authorized Hill to perform Item C services; instead, the County itself took direct responsibility for all "resident engineer" tasks. (V. 76 at 11484; V. 77 at 11279-280, 11308-309; V. 96 at 14249, 14256). The second paragraph of Item C calls for "on-site observations of the work and progress, and field checks of materials
and equipment." The "field checks" provision with regard to materials and equipment again confirm that Item C's discussion of "construction" related services is a discussion of matters to occur at the pipeline installation site, not a pipe manufacturing factory.

These plain readings of the language of the Hill Contract are bolstered by the context of its drafting. No one knew when the Hill Contract was signed in 1975 that the County would elect to save sales tax some two years later by contracting directly with a pipe supplier, rather than going through a general contractor. Indeed, the County's primary contract negotiator acknowledged that the Hill Contract was signed at a time when the County intended to use a single contractor both to purchase the pipe and to install the line. (V. 76 at 11177). Design phase supervisory services by Hill, which were completed before a pipe supplier was even selected, could not have plausibly been intended to include pipe manufacturing supervisory services.

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22 The very location of the Item B exclusion is in the midst of a discussion of "construction" duties and construction "contractor" related to the installation of pipeline, not the pipe segment manufacturer

The plain language of the Hill Contract is at odds with the County's contention, as adopted in the final judgment, that Hill's engineering services required supervision over pipe segment manufacture. It was error for the judge to conclude that Hill breached a contractual duty to perform pipe segment manufacture-related duties.

2. *Hill could not be held to a contractual duty under the County's contract with Interpace through the legal fiction of a "merger" of two separate documents.*

A second basis for finding Hill in breach is the final judgment's legal fiction of "merger" of the Hill Contract with the Interpace Contract.[23] Hill was not a signatory to the Interpace agreement. The latter was signed almost two years after Hill's contract. Not one case is identified in the final judgment for the proposition that a non-signatory to a contract is obligated to perform duties identified within that contract, let alone when the two documents are not contemporaneous. The County argued its theory of contract merger — in order to bind Hill to the terms in the Interpace Contract by invoking two doctrines of judicial construction: *"in pari materia"* and "construction against the drafter." Neither legal theory has any sound or legitimate application to this circumstance.

Not surprisingly, the final judgment does not rely on any case in which the *in pari materia* doctrine was utilized in a like circumstance. It sole reliance is on *Standard Newspapers, Inc. v. Woods*, 110 So.2d 397 (Fla. 1959), where a second, contemporaneous and interdependent contract was signed because the first would not have been entered without the other. Under these circumstances, the court construed the second contract as being *in pari materia* with the first. Quite clearly, there is no similarity between the *Woods* situation and this one. Unlike *Woods*, Hill did not benefit from the Interpace Contract. Unlike *Woods*, the Interpace Contract was not contemporaneous in time with the Hill Contract. Unlike *Woods*, the 1975 Hill Contract was not contingent on the 1977

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23 This fall-back thesis inherently acknowledges that the Hill Contract, standing alone, could not support liability for manufacturing-related duties.

Interpace Contract.

The trial court's acceptance of the County's second doctrine of judicial construction — construing agreements against the drafter — is equally far afield. That doctrine applies only where a signatory to an agreement has drafted the document. The doctrine has never been applied in Florida to impose duties on a non-party. Again, the cases identified in the final judgment reflect a very different situation — the typical circumstance of construing a contract against the *signator*-drafter.[24]

The importation of a "merger' doctrine into this case is ludicrous. As stated in *In re: Estate of Samuel Donner*, 364 So.2d 742 (Fla. 3d DCA 1978):

> Ordinarily, a contract cannot bind one who is not a party thereto since to create a valid contract there must be reciprocal assent to a certain and definite proposition.

(Citations omitted); *see also Ogden v. Groves*, 241 So.2d 756 (Fla. 1st DCA 1970). Likewise, in *Jenkins v. City Ice & Fuel Co.*, 118 Fla. 795, 160 So. 215, 217 (Fla. 1935), the court recognized that

> A third party is not liable as a rule upon a contract, express or implied, unless he was one of the immediate parties to the agreement or has become a party to it by subsequent agreement with the original parties.

The trial court's conclusion — that the identification of engineering duties in the Interpace Contract bound Hill to perform those duties — should be compared with the reasoning in *Lawrence v. United States*, 378 F.2d 452, 461-62 (5th Cir. 1967):

> A person is not made a party to a contract merely by being named and described in it or merely by the

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24 *Sol Walker & Co. v. Seaboard Coast Line R.R. Co.*, 362 So.2d 45 (Fla. 2d DCA 1978); *Bouden v. Walker*, 266 So.2d 353 (Fla. 2d DCA 1972); *Allegheny Mutual Casualty Co. v. State*, 176 So.2d 362 (Fla. 2d DCA 1965).

> fact that such a contract is referred to in a second instrument in a way to evidence that such a person is a party in another contract. This is especially true if the parties are different, are not identical, or if there is an absence of one or more significant elements of identity.

(Footnotes omitted).

The Florida Supreme Court recently demonstrated the narrow circumstances which must pertain to tie together and merge two distinct contracts. *OBS Company, Inc. v. Pace Construction Corp.*, 558 So.2d 404 (Fla. 1990), involved a lawsuit between subcontractor (OBS) and general contractor (Pace). Pace alone was in direct contractual relationship with the owner. OBS had only a direct contractual relationship with Pace. When OBS sued, Pace defended by asserting it had not been paid by the owner, and therefore it should not have to pay OBS.

Because OBS' agreement with Pace contained a provision which expressly incorporated the agreement between the owner and Pace as part of the Pace contract with OBS, the court was able to link the two agreements and require Pace (as signatory to both contracts) to pay OBS. There is a complete absence of any comparable incorporation by reference in this case. The only common signatory to the contracts here was the County, not Hill.

A case factually akin to this one is *Bernard Johnson, Inc., v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tx. 1982). In *Johnson*, a non-party architect/engineer was charged with a breach of a contract between the construction contractor and the owner, based on the allegation that the non-party engineer had assumed the obligations specifically assigned to it in that owner-contractor contract. The court rejected the attempted use of the contractor-owner's contract as a basis to impose liability on the architect/engineer, finding it to be unheard of and without legal support. The court lucidly explained that the substantive law on breach of contract exists because of the societal interest in having a person perform his promises, whether express or implied, so that actions for breach of contract "are inherently possible against promisors only." 630 S.W.2d at 369. While duties for the engineer may have been expressed in a contract to which it was not a party, due to the fact it

"was not in legal contemplation a party to the contract, it owed no contract-based duty to [the contractor]."[25] 630 S.W.2d at 370.

The artificiality of the court's "merger" theory is exposed more vividly by reviewing the language of the Interpace Contract, to which Hill was not a party. That 1977 contract defined Interpace as "supplier," not the unnamed "contractor" in the 1975 Hill Contract.[26] The terms of the Interpace Contract, moreover, were all keyed to engineering services relative to post-manufacture activities when pipe segments were delivered to the installation site. For example, section C-03(a) of the Interpace Contract provided that

> All materials furnished, when not in accordance with the intent of the Plans and Specifications, will be rejected *and shall be removed immediately* and replaced by suitable and satisfactory materials....

(V. 8 at 994 C-2) (emphasis added). This language deals with the *removal* of pipe segments brought to the installation site for failure to meet design drawings, plans and specifications.

Section C-03(a-1) authorizes the owner to stop supply of the pipe "[i]f the supplier fails to *remove* any defective materials ...." (emphasis added), plainly relating to delivered or installed pipes which proved to be defective and were to be removed from the system. Section C-03(b) places the burden on Interpace, as the

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25 *Haddad v. Bagwell*, 317 S.W.2d 781 (Tx. 1958), is a similar case involving an owner's claim against an architect where the owner's contract was solely with a contractor. That case had the same outcome. The court held that the architect was entitled to summary judgment in the owner's suit since he was not an immediate party to the contract, not one for whose benefit it was made, and not in privity.

26 In fact, the term "construction" in the definition of "supplier" is expressly said to pertain "for purposes of *this* Contract" [meaning the Interpace Contract]. A logical correlation of the two contracts would identify Interpace as the "materials supplier" or the "equipment manufacturer" mentioned in the Hill Contract.

supplier, to confirm with the engineer through independent testing that the pipe segments have passed tests prior to delivery, and section G provides that Interpace, as supplier, has agreed "to permit a representative of the county, and/or its engineer ... to inspect the work progress ...." (V. 8 at 1020 G-3 ¶6). Interestingly, this latter section, which *does* specifically relate to the manufacturing site, provides only a right, not a duty of inspection at the manufacturing plant.[27]

Finally, if the terms of these respective contracts were doubtful as to the absence of any contractual duty on Hill, and if there were a doctrine of merger in a case such as this, the performance of the parties in relation to the provisions of the contracts removes any possible view of the contracts as requiring Hill to inspect the pipe manufacture plant.[28] The County was designated as the recipient of any testing data to be provided by the manufacturer. (V. 8 at 981; V. 128 at 19043 p. 1010-3, 15060-2 [REV]). If the County desired additional laboratory testing of the manufactured pipe segments and desired that testing be done by Hill, the County was required to request those services specifically under Item D of the Hill contract. The County never did this.[29]

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27 The County in fact inspected the manufacturing plant repeatedly. (V. 96 at 14229-231, 14245-246, 14257-259, 14281). Section G-3 in the Interpace Contract also belies the interpretation given the provision of Hill's contract which called for four monthly visits to the "construction site". Were those four visits actually meant to be to the factory, then Hill's mere option to visit the factory, as contained within the Interpace Contract, would have been meaningless.

28 The final judgment wrongly concluded that if Hill was not performing duties related to resident engineering at the pipeline, the no one was performing those duties. The County had itself assumed these resident engineering and inspection services. (V. 8 at 995).

29 Neither the Hill Contract, nor the Interpace Contract, imposed a material testing obligation on Hill. This was Interpace's obligation primarily, with an adjunct responsibility of the County to obtain further materials testing if it deemed necessary. (V. 8 at 995)

In point of fact, the County had obtained tests of components of pipe samples from Interpace's Lacoochee pipe manufacturing plant, and County employees visited the Lacoochee pipe plant several times. (V. 96 at 14229-231, 14245-246, 14257-259, 14281). The County even suspected that the aggregate used to manufacture the concrete coating of the pipe was inadequate. (V. 84 at 12412-413).

The Hill Contract and the Interpace Contract are not legally or factually susceptible of merger, and the parties' course of performance directs a conclusion to the contrary because the County reserved to itself and in fact performed all "resident engineering" duties. The trial judge's conclusion (acting through the County's mind and pen) that only Hill was available to protect the County, is nowhere supported in the record or in law.

3. *Hill's pipeline design was free of defects.*

a. *Hill did not breach its contract in relation to Interpace's use of class IV wire in pipe segments.*

The trial court's final judgment found that Hill breached its contract by allowing Interpace to use class IV wire. Class IV wire was appropriate under the standards in existence at the time, however. The trial court has applied 1989 opinion testimony to interpret a 1977 contract, notwithstanding that Class IV wire conformed with AWWA C-301 standards when the Interpace Contract was made.

When Interpace contracted with the County to provide manufactured pipe segments, it agreed that segments would comply with AWWA C-301 standards, and Interpace in fact submitted shop drawings which specified that the pipe segments would be manufactured in accordance with AWWA specification C-301-72. (V. 128 at 19045). That standard specifies wire conforming to ASTM Designation A-227, but also provides that

> wire with specified minimum tensile strengths exceeding those in A-227, class II, may be used if the wire meets the other requirements for class II in that specification, and the pipe design may be based on these higher strengths.

(V. 128 at 19041).

By definition, class IV wire has a higher minimum tensile strength than class II wire, and it can be manufactured to meet all

other requirements for class II set forth in A-227. (V. 112 at 16858-859, 16863, 16868-869; V. 248 at 28040 pp. 156-69).

The chairman of the committee which authored AWWA C-301 in 1972 ("C-301-72"), Walter Neubauer, testified that class IV wire was plainly allowed and contemplated as a product meeting AWWA C-301-72. (V. 112 at 16835-920). Two other individuals who sat on the standards committee agreed that class IV wire could be used under that standard. (V. 93 at 13749, 13767, 13772, 13792-796). That fact was even acknowledged by the County's own expert, John Kiefer, and County experts who had tested the class IV wire used in pipe segments on this project found that it passed all specific A-227 test requirements. (V. 99 at 14738 pp. 156-59; and see this brief at p. 9, line 1-2).

Nonetheless, at trial the County arrayed a chorus of so-called expert voices consisting of engineers and metallurgists, none of whom ever sat on or participated in the work of the standards committee, who took a different view of AWWA C-301-72. This group contended from their 1989 vantage point that the standard should be read to permit tensile strengths exceeding the class II minimum, but only within the class II tensile range. (V. 39 at 5923-25; V. 46 at 6894, 6945-46; V. 50 at 7445-46; V. 60 at 8843; V. 168 at 21835 pp. 106-07, 116). This interpretation, of course, would make C-301-72 wholly redundant with A-227, which *already* allowed for use of wire with tensile strengths inclusive of the class II maximum.

There was no testimonial dispute at trial among the standards experts on the acceptability of class IV wire. The testimony of County witnesses who found a different meaning in the language some 17 years after it was written does not detract one whit from the fact that a reasonable design engineer in 1977 would readily have approved the use of class IV wire as being in compliance with C-301-72. Their disagreement as to what the standard would allow suggests, at best, an ambiguity in its wording. But any engineer in 1977 who believed there was ambiguity in C-301-72 and been concerned on receipt of Interpace's submittal sheet identifying its intention to use class IV wire, logically would first have contacted the drafting committee of the standard to inquire regarding the committee's intent. The uniform testimony at trial shows the answer they would have received: class IV was perfectly proper under AWWA C-301-72. Hence, it was clearly reasonable for Hill

to have accepted Interpace's selection of class IV wire in 1977.[30] (V. 112 at 16858-861).

The trial court's conclusion that class IV wire was not authorized for this pipeline is also legally defective. It contradicts the prohibition in Florida law against a court's reinterpretation of contract language which is otherwise clear and unambiguous. *See Hamilton Construction Co. v. Board of Public Construction*, 65 So.2d 729 (Fla. 1953); *Paddock v. Bay Concrete Industries, Inc.*, 154 So.2d 313 (Fla. 2d DCA 1963). It makes Hill, in its role as design engineer, a guarantor of the proper manufacture of pipe by Interpace, contrary to Florida law that a design professional's obligations do not include the guarantee of a perfect plan or a satisfactory result. *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (Fla. 1918). A design professional is obliged only to perform contractual duties in accordance with the professional "standard of care used by similar professionals in the community under similar circumstances." *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd.*, 552 So.2d 228, 232 (Fla. 5th DCA 1989), *rev. denied., sub nom., Anderson v. Willingham Realgrowth Investment Fund, Ltd.*, 563 So.2d 631 (Fla. 1990); *see also Ahimsa Technic, Inc. v. Lighthouse Shores Town homes Development Co., Inc.*, 543 So.2d 422 (Fla. 5th DCA 1989). The evidence was overwhelming that the specifications drafted by Hill and ultimately utilized by the County and Interpace as part of the Interpace Contract, including those for class IV wire, were well within the standard of professional care owed by a design engineer in its contractual relationships.[31]

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30 Interestingly, the County's own engineer, Mike Flanery, used the *same specifications* both before and after this project and allowed the use of class IV wire. (V. 84 at 12471-476).

31 If accepted, the "guarantee theory" of the trial court would usher in an age of unlimited liability for all engineers or architects submitting design plans to be administered by contractors and others. This very concern was acknowledged in *E.C. Goldman, Inc. v. A/R/C Associates, Inc.*, 543 So.2d 1268 (Fla. 5th DCA), *rev. denied*, 551 So.2d 461 (Fla. 1989), as one which would curtail the entire profession of consulting services, contrary to the public policy of this state. The engineer or architect would be cast as responsible party for the defect-free functioning of numerous components

b. *Hill did not breach its contract in relation to pipeline pressure.*

The County's ghost-written final judgment hints that Hill breached a contractual duty by failing to design a pipeline for operation at 150 psi. This is another baseless conclusion.[32] The Hill Contract incorporated the design assumptions of the County's Master Plan, which called for 100 psi operating pressures only.[33] In any event, Hill specified (and in turn Interpace manufactured) pipe segments in fact designed to operate at 150 psi, with a protective surge component to 210 psi. (V. 128 at 19043 pp. 15060-1 [REV]; *Id.* at 19045. The County consistently has operated the pipeline at or below 100 psi anyhow. (V. 83 at 12238-240, 12246, 12293).

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31 cont. manufactured by difference companies located in different places across the country.

32 The County's evidence on this point is not a breach of a 1975 contract which called for 100 psi pressures, but rather the speculation that pressures to 150 psi may be required at some time in the future. (V. 83 at 12236-239; V. 84 at 12388, 12499-501).

33 Other components of the pipeline such as meters, not just the pipe segments, were also designed to operate below 150 psi. (V. 42 at 27704, 27705; V. 99 at 14786). This integrated pipeline project was never conceived by Hill or the County to *operate* at 150 psi, whatever operating pressure over 100 psi the pipe segments may have been manufactured to withstand.

APPENDIX X

Excerpts from Answer Brief of Appellee, PINELLAS COUNTY, to Initial Brief Of Appellant, CH2M HILL

X - 2

DISTRICT COURT OF APPEAL
STATE OF FLORIDA
SECOND DISTRICT

MADISON MANAGEMENT GROUP, INC., and CH2M HILL SOUTHEAST, INC.,

Appellants,

v.

PINELLAS COUNTY, FLORIDA,

Appellee.
_____/

On Appeal from the Sixth Judicial Circuit, for Pinellas County, Florida

Case Nos. 90-2027 and 90-2028
(Consolidated)
(Case No. 90-2027)

ANSWER BRIEF OF APPELLEE, PINELLAS COUNTY, TO INITIAL BRIEF OF APPELLANT, CH2M HILL SOUTHEAST, INC.

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ARGUMENT

Point One

The Engineer Was Correctly Held to be Liable for Breach of Contract

Lacking in-house technical expertise to design and supervise the manufacture of the prestressed pipe to be used in its pipeline, the County turned to the Engineer for these services. The Engineer promised not only to design the pipeline but also to undertake certain specified steps in an effort to ensure that its design specifications were actually met. (*See* AS 2). These steps are clearly spelled out in the "Contract Documents" — documents that were in every instance prepared by the Engineer and that include, according to the Engineer's own definitions, Interpace's contract with the County and the specifications themselves. (AS 1). The Contract Documents form the contractual framework that knitted together the respective responsibilities of the Engineer and the pipe manufacturer to the County on this project.

Central to this framework were the specifications prepared by the Engineer, which detailed the *performance* requirements for the pipe and the *qualities* of *materials* to be furnished in its manufacture. In the specifications, the Engineer prescribed how its design was to be achieved, and it identified each element necessary to achieve that design, from manufacture of the pipe to laying it in the ground. Then, to assure that its specifications were satisfied, the Engineer carefully provided checks and balances in each of the Contract Documents *it prepared* — its contract with the County, the specifications it drew up for the County, and Interpace's contract with the County — which, if properly executed, would enable the Engineer to detect defective or non-conforming materials in the pipe *prior to* its installation underground.

As the evidence and trial court's findings make clear, the Engineer never implemented those checks and balances. Had the Engineer carried out its oversight responsibilities, Interpace's defective pipe would have been detected before it was ever put into the ground. Realizing this, the Engineer seeks to avoid responsibility by recasting its obligations to the County. Simply put, the Engineer seeks to erase the obligations set forth in the

Contract Documents it prepared for the construction of this pipeline.

The Engineer makes two arguments in this regard. The Engineer first asserts that the obligations it assumed in its agreement with the County with respect to the work of "the contractor" did not mean the work of the pipe manufacturer because, according to the Engineer, the County did not at that time contemplate contracting with the pipe manufacturer. The Engineer also disclaims all responsibility as "the Engineer" under the Interpace contract, merely because it was not a formal signatory to it — even though the Engineer had prepared that contract, had expressly defined itself as "the Engineer" in that contract, and had granted itself the right to act for the County *under that* contract. By these strained arguments, the Engineer claims that it had no duty to perform any duties with respect to the manufacture of the pipe, including the duties it had imposed upon "the Engineer" in the Interpace contract to ensure that the pipeline it designed was provided by the manufacturer.

The trial court correctly found the Engineer's contentions to be without merit in fact or in law. The court determined that the Contract Documents should be read together to determine the Engineer's duties to the County, but it further found that, *even* under the Engineer's contract *alone*, the Engineer assumed specific oversight duties as to the manufacture of the pipe. Thus, reviewing those contracts *both* together *and* independently, the court concluded that the main duty of the Engineer was to ensure that Interpace complied with the specifications.

As the trial evidence demonstrated and the trial court found, the Engineer did not perform its oversight duties. The court determined that the Engineer was therefore "just as responsible as Interpace for a grossly defective pipeline being placed into service." (AJ 159). It did not err in reaching that result. In fact, the Engineer does not even take issue on this appeal with the vast majority of the breaches that were found by the trial court, and those unchallenged findings alone require affirmance of this judgment.

1. *The Trial Court Correctly Construed the Two Contracts In Pari Materia to Determine the Duties Owed By the Engineer to the County*

Florida courts have long recognized that two or more writings evidencing an agreement must be construed together. *J.M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So.2d 484, 486 (Fla. 1957). As the Supreme Court's decision in *Montgomery* makes clear, this is true where, as here, the instruments concern the same subject matter, even though they are not executed at the same time by the same parties for the same purpose.

In *Montgomery*, the plaintiff subcontractor contracted with the defendant general contractor to perform certain roofing, sheet metal, and ventilation work. The general contractor subsequently executed an agreement with another subcontractor to provide the same ventilation work. When the plaintiff, which did not do any ventilation work, demanded payment for the work it did perform, the general contractor claimed an offset for the ventilation work provided by the other subcontractor. Refusing to view the two construction contracts in isolation, as the Engineer would have this Court do, the Supreme Court squarely held that the trial court should have interpreted the two subcontracts together to determine the duties the plaintiff owed to the general contractor:

> While the situation does not fall strictly within the rule that where an agreement is evidenced by two or more writings, the writings must be construed together, it has been said that "This rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days, but concerning the same subject matter, may under some circumstances be regarded as one contract and interpreted together."

Id. at 486 (citations omitted).

The trial court's decision to likewise construe these contracts in pari materia was founded upon the very factors that were central to the decision of the *Montgomery* Court. First, the County's contracts with the Engineer and Interpace were part and parcel of the same pipeline project. Second, these contracts concerned the same subject matter, namely, the design and manufacture of prestressed pipe for that same project. Third, the same County official executed both contracts on behalf of the County. Finally, the contracts

were of the same dignity, with both parties directly contracting with the County to provide services necessary to give the County the pipeline it required. Under those circumstances, *Montgomery* requires the contracts to be interpreted together, exactly as the trial court did.

Other Florida courts have held the same effect.[7] This Court's decision in *Northwestern Bank v. Cortner*, 275 So.2d 317, 320 (Fla. 2d DCA 1973), is especially instructive. Cortner had executed a guarantee with a bank promising to satisfy, up to a certain limit, debt obligations between the bank and another party. Some 30 days later, the bank executed a loan agreement with the other party. Construing the two written agreements together, this Court held that the guarantee was conditioned upon the bank's performance of certain obligations in the loan agreement, which the bank did not do. *Id.* at 320 (citing *Fink*, 174 So.2d at 38; *Baker*, 207 So.2d at 1300).

In *Cortner*, as in this case, the agreements were not executed at the same time nor were they between the same parties. Nevertheless, this Court read them in pari materia. The trial court's decision to construe the County's contracts with the Engineer and with Interpace together was completely consistent with this controlling precedent as well as *Montgomery*.

Moreover, additional considerations exist here that further mandate construction of the two contracts together. When the County and the Engineer entered into their contract in 1975, the parties clearly contemplated that a later contract or contracts would follow. The Engineer specifically included a provision in that contract specifying that it would prepare those additional contracts as well as the contract specifications for the project. (AS 2,

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7 *See, e.g., Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291, 1297 (5th Cir. 1980) (applying Florida law); *Cushman v. Smith*, 528 So.2d 962, 964 (Fla. 1st DCA 1988); *Miami National Bank v. Fink*, 174 So.2d 38, 40 (Fla. 3d DCA), *cert. denied*, 180 So.2d 658 (Fla. 1965); *cf. Baker v. Maytag*, 207 So.2d 300, 303 (Fla. 3d DCA 1968) (although court was faced there with construction of multiple contracts executed by same parties, court noted that applicable law in Florida extended rule construing contracts together to multiple contracts executed by different parties at different times).

item A). Pursuant to this requirement of its contract, the Engineer prepared not only Interpace's contract with the County, but also the specifications and bid proposal for the manufacture of the pipe. (AS 1). The Engineer's own expert acknowledged that the Engineer's preparation of both contracts required their consideration as a whole. (R 25183-85). The point is, the Engineer composed the contractual framework and defined the rights and obligations of *all* of the parties, including itself, with respect to the pipe manufacture. In doing so, the Engineer specifically placed itself in the County's shoes under the Interpace contract by defining itself there as "the Engineer" and then obligating "the Engineer" to act as the representative of the County. The Engineer cannot now escape liability for failing to perform duties that, by its own drafting, it undertook to perform.

For example, the Interpace contract specified various means for the Engineer to ensure the manufacture of the pipe was performed in accordance with the specifications. The contract required Interpace "[t]o permit a representative of the County, and/or its Engineers...to inspect the work and progress, or any of the materials," and also required Interpace to furnish "all reasonable facilities, labor and materials deemed necessary by the Engineer, for the conducting of such inspections and tests as he may require." (AS 1, §G-3(6)). Likewise, that contract provided that Interpace was required to have its materials tested by entities approved by the Engineer and to "furnish evidence satisfactory to the Engineer that the materials and finished articles have passed the required tests prior to delivery." (AS 1, §C-03(b)). All invoices from Interpace were subject to review and approval by the Engineer. (AS 2, item B-3).

In addition to those duties that the Engineer affirmatively imposed upon itself and hence assumed under the Interpace contract, the Engineer further provided in that contract that Interpace was responsible for defective materials "even though such materials may have been previously inspected by the Engineer and accepted or estimated for payment." (AJ 138-39; R 5992-93; AS 1, §C-03). This provision obviously would not have been included by the Engineer if it did not intend to assume the obligation to inspect the materials used in the pipe manufacture. The Engineer can hardly complain that it is being held accountable for the oversight

responsibilities that it specifically wrote into these contracts for itself.[8]

On their face, then, the Contract Documents — defined by the Engineer to include the Interpace contract — encompassed the entire project, including the manufacture of the pipe. Equally clear is the Engineer's obligation to see that the "intent of the Contract Documents" was achieved, which included, at the most fundamental level, the obligation to see that the pipe was manufactured in accordance with its specifications.

The Engineer attempts to avoid responsibility for the defective pipe by claiming that its contract with the County, read alone, does not encompass the manufacture of the pipe. The Engineer asserts that the term "contractor" in its contract with the County does not mean Interpace and that the term "construction" does not include manufacture of the pipe. In short, the Engineer seeks to divorce the installation of the pipe from its manufacture, even though the specifications encompass *both* the manufacture and installation of the pipe.

It is true that, as the trial court recognized, the Engineer did not expressly define the terms "contractor" and "construction" in its contract with the County. These terms are defined, however, in the Engineer's specifications, which are expressly incorporated in the agreement between Interpace and the County, and those definitions — selected solely by the Engineer — should be used in construing those same terms used by the Engineer in its own contract with the County. These definitions leave no doubt that the Engineer's contract with the County obligated the Engineer to perform the specified duties with respect to Interpace's manufacture of the pipe.

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8 This is especially the case since the Engineer admittedly undertook to perform some of those checks, albeit not properly. *See Cushman*, 528 So.2d at 965 (court found two contracts executed at different times by different parties constituted agreement for sale of property in part because all parties complied in part with the requirements of those contracts); *see also General Trading Corp. v. Burnup & Sims, Inc.*, 523 F.2d 98, 101-02 (3d Cir. 1975) (architect who prepared contract between owner and contractor and assumed duties during course of construction assigned to architect in that contract held liable for failing to properly perform those duties).

For example, the AWWA C301-72 standard, which is an integral part of the Engineer's specifications, defines "contractor" as "the company executing the contract with the purchaser to furnish pipe and fittings according to this standard." (AS 3, §1.2.2). "Construction" is specifically defined in the Engineer's specifications as "*manufacture* and delivery." (AS 1, §B-01(a-5)). The bid proposal prepared by the Engineer not only identifies *Interpace* as the "Contractor," it was executed by Interpace as the "Contractor." (AS 1, pp. E-1, E-9). The duties that the Engineer specified for itself in its contract regarding the "construction" work of "the contractor" must be read in light of those definitions. To do otherwise would be to blindly ignore the Engineer's own contractual scheme set forth in the "Contract Documents."

This Court should not allow that unwarranted disregard of the Contract Documents. Apart from the settled teachings of the Florida Supreme Court in *Montgomery* and this Court in *Cortner*, courts in other jurisdictions have specifically determined that an agreement between an owner and a construction contractor is directly relevant to construing ambiguous terms in the contract between the owner and the project's architect or engineer.[9] The decision of the Mississippi Supreme Court in *Dickerson Construction Co. v. Process Engineering Co.*, 341 So.2d 646 (Miss. 1977), is directly on point.

In *Dickerson*, an owner sued the contractor and architect-engineer for breach of contract as a result of structural deficiencies in the building. In its contract with the owner, the engineer promised to "endeavor by general administration of the construction contracts to guard the Owner against defects and deficiencies in the work of contractors." *Id.* at 650. The engineer's argument that the term "general administration" did not require supervision of construction was *rejected* by the court, which held that "the agreement between Owner and Contractor becomes particularly relevant" in determining the meaning of such a term. *Id.* at 650-51.

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9 *See, e.g., Reber v. Chandler High School District, No. 202*, 13 Ariz. App. 133, 474 P.2d 852, 855 (1970); *Walker v. Wittenberg, Delony & Davidson, Inc.*, 241 Ark. 525, 412 S.W.2d 621, 630 (1966).

The court emphasized the fact that the engineer had prepared *all* the contract documents, just as the Engineer did here. Under the owner's contract with the contractor, the engineer was authorized to act as the owner's representative during construction, to reject work, to certify payments during construction, and to conduct periodic visits to determine if the work was in accordance with the contract. In light of those duties, the court found unconvincing the narrow contractual construction urged by the engineer with respect to its contract with the owner.

These duties are *precisely the same duties* provided for the Engineer under the County's contract with Interpace. (*See* AJ 144-46). Indeed, the Engineer was explicitly authorized, by name, to act on behalf of the County under that contract. To suggest, as the Engineer does, that it nevertheless had no obligations with respect to the manufacture of the pipe flies in the face of the very Contract Documents it prepared, which, read as whole, plainly establish to the contrary.[10] The reasoning of the *Dickerson* court is eminently sound, and it demonstrates the correctness of the trail court's rejection of the Engineer's attempted reading of its contract in isolation.

The Engineer relies heavily upon *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex. Civ App. 1982), where the contractor sought to assert contractual claims against the architect although there was no contract between them. The court

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10 Moreover, if the Engineer had no responsibility with respect to the manufacture of the pipe, it was then guilty of an independent act of professional malpractice. The Engineer undeniably agreed in its contract with the County to prepare adequate contracts for this project, and it did prepare the Interpace contract. The County was entitled to rely on what the contract drafted by the Engineer expressly said. The Engineer later maintained that its name had been inserted by "mistake" — its own mistake! But mistake is the stuff negligence claims are made of — it does not take an intentional wrongdoing to make a professional liable in tort for malpractice. And, if the Engineer did not intend to perform the oversight responsibilities designated for the Engineer in that contract, it certainly was guilty of malpractice in failing to tell the County this so it could retain someone else to perform those responsibilities. (*See* AJ 159-61).

found "in these circumstances" that the duties assumed by the architect in the contract between the owner and the contractor could not be enforced *by the contractor*. *Id.* at 370. Of course, that is not what the trial court did either. To the contrary, the trial court allowed Contract Documents, prepared by the Engineer on behalf of the County as the owner, to be enforced *by the County*.

Significantly, in *this* very different regard, the *Johnson* court recognized that *"any duty or power assigned to the architect in the building contract is for the benefit of the owner who employed the architect."* *Id.* at 371. This critical distinction is directly applicable here, since the County seeks to enforce only those duties that the Engineer expressly assigned to itself, for the County's benefit, in the Interpace contract. Under *these* circumstances, the *Johnson* decision supports the County, *not* the Engineer.

The Engineer also relies heavily upon the "reasoning" in *Lawrence v. United States*, 378 F.2d 452, 461-62 (5th Cir. 1967). However, this was not *the court's* reasoning at all, much less its holding. Instead, it was the reasoning of the *appellant* in *arguing* that the court should not construe its contract with the Government together with the contract between the Government and the construction contractor — an issue that the court itself never reached. The court did note, however, that the question of interpreting either a single contract or series of contracts together was determined by what the parties intended through the "form and manner [of the words] employed." *Id.* at 462. That is consistent with the rule in Florida as expressed in *Montgomery* and *Cortner*, as well as the trial court's findings in this case.

All of the other cases cited by the Engineer are equally inapposite.[11] This holds true for *OBS Co. v. Pace Construction Corp.*, 558

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11 Jenkins v. City Ice & Fuel Co., 118 Fla. 795, 160 So.2d 215, 217 (1935) (supplier not entitled to enforce contract with previous owner of business against subsequent owner); *In re Donner's Estate*, 364 So.2d 742 (Fla. 3d DCA 1978) (former wife not entitled to equitable lien against widow's dower despite deceased husband's breach of divorce agreement in antenuptial agreement with widow); *Ogden v. Groves*, 241 So.2d 756 (Fla. 1st DCA 1970) (employees not bound by terms of second oral contract when they were not present when it was made even though they were parties to previous oral contract with same party).

So.2d 404 (Fla. 1990). Relying on an express incorporation by reference clause, the Florida Supreme Court found an ambiguity in the payment terms in the two cross-referenced contracts. Contrary to the Engineer's assertion, however, the Court did *not* adopt any blanket rule limiting the circumstances in which contracts can be construed together to only contracts that are incorporated by reference. Indeed, any such argument is belied by the decisions in *Montgomery* and *Cortner* on this specific issue; those decisions made it clear that the trial court properly construed the two contracts in pari materia to determine the scope of the Engineer's duties to the County.

2. *The Engineer's Contract Independently Imposed Duties Upon It That Were Breached.*

Even reading the Engineer's contract with the County in strict isolation as the Engineer urges, that contract independently required the Engineer to see that the pipe provided by Interpace conformed to the Engineer's specifications. In fact, the Engineer expressly agreed under that contract to "[p]rovide consultation and advise as to...laboratory testing and inspection of samples or materials,...and act as the [County's] representative in connection with any such services." (AS 2, item A(1)). These services could *only* be performed during the manufacturing process itself.

Furthermore, the Engineer was obligated under that contract to check "the contractor's shop drawings" for general conformity to the plans and specifications. (AS 2, item B(2)). The Engineer admittedly reviewed *Interpace's* shop drawings, as well as Interpace's submittal sheets (R 9504-06), thus treating Interpace as the "contractor." Likewise, the Engineer was obligated under its contract to approve the pay requests of "the contractor," and it approved the pay requests of *Interpace* throughout the manufacturing process. (R 14411; Ex. 1171; AS 2, item B(3)). The court concluded, with unimpeachable logic, that if Interpace was "the contractor" as to *those* duties, it was also "the contractor" with respect to the *other* duties imposed in that contract. (AJ 136).

In truth and fact, the Engineer treated Interpace as "the contractor" — whose performance it was obligated to judge — from the start of this project to its end. In addition to receiving information from Interpace regarding the construction of the pipe, the Engineer's project manager actually visited Interpace's manufacturing plant on various occasions throughout the manufacturing

process. (Ex. 767A-F, vol. I, p. 35). Although he remarkably claimed at trial that his visits were only out of "curiousity" and were not intended to protect the County's interests (R 14461, 14465.67), the trial court understandable found that these visits were not made out of mere "curiosity" but rather as a part of the Engineer's specific agreement to visit the construction site on a regular basis. (AJ 157-58).

In sum, the Engineer's work was *not* limited to the installation of the pipeline, but actually commenced at the very outset of this project and continued throughout the manufacturing process itself. Given all these circumstances, the trial court correctly found that the Engineer had undertaken the responsibility to monitor the manufacture of the pipe to assure its conformance to its specifications.[12]

The Engineer ignores the obligations it undertook in order "to effect proper carrying out of the intent of the contract documents" and argues instead that it was only required to, and did only, monitor the *installation* work. Nowhere in its contract with the County, which the Engineer prepared, did it limit its obligations to the County to oversight of the installation of the pipeline, and any ambiguity as to its responsibilities must be construed *against* the Engineer as the drafter of its own contract.[13] Reading the Engineer's contract to include oversight of the pipe manufacturing process within the Engineer's responsibilities is the only rea-

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12 Experts for *both* the County and the Engineer agreed that manufacturing defects can not be effectively detected without visiting the manufacturing plant. (R 25187; AT 168). If, as the Engineer suggests, it had no responsibility to oversee the manufacturing process, the Engineer then breached its promise to advise the County with respect to services necessary to ensure the pipe was constructed according to the specifications. The court's finding of this breach is unchallenged. (AJ 159-61).

13 *Coastal Caisson Drill Co. v. American Casualty Co.*, 523 So.2d 791, 792 (Fla. 2d DCA 1988), *approved*, 542 So.2d 957 (Fla. 1989).

sonable construction of the obligations set forth in that contract.[14] This is especially the case since the Engineer acted consistently with that construction. The trial court did not err in concluding that the Engineer obligated itself to see that the pipe it had designed and specified was manufactured in conformance with the design and specifications.

3. *The Engineer Failed To Perform Its Contractual Duties.*

As shown above, the Engineer was contractually required — both under its contract read alone and the contracts read in pari materia — to monitor Interpace's work and take the necessary steps to ensure that Interpace complied with the specifications. As the trial court correctly found from the overwhelming evidence, the Engineer breached those duties. The checks and balances provided by the Engineer were not properly implemented. Had they been, they would have protected the County from becoming another victim to Interpace's quality-cutting and profit-enhancing scheme.

First, *before* the County even engaged Interpace — upon the Engineer's recommendation — all bidders, including Interpace, were required to submit to the Engineer a list of similar past jobs. Interpace did so. (AS 1, p. E-11). However, the Engineer *never* checked Interpace's references. (R 9518). If the Engineer had done so, it would have discovered that Interpace's proposed use of Class IV wire had been rejected on another project because it did not conform to ASTM standards. (R 5876-81, 10047-54). By failing to check the very references it had insisted upon, the Engineer failed to provide the oversight that would protect the County against deficiencies in the contractor's work. (AT 170).

Second, the Engineer likewise failed to properly review critical information in the submittal sheets Interpace provided to the Engineer prior to the County's execution of the contract with Interpace. The reviewing engineer admitted that he did not check all of the design formulas set forth in the submittals (R 9523-50) and thus did not discover that they were inadequate to produce pipe that would operate at 150 psi working pressure as the

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14 Courts will not adopt an unreasonable construction of a contract. *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 941 (Fla. 1971).

specifications required. (R 9523-50; AT 177). Nor did the Engineer discover that the materials Interpace intended to use failed to meet the national standards specified by the Engineer. Yet the obligation to review and approve those submittals was indisputably one of the Engineer's primary responsibilities.

Even after the contract was awarded to Interpace, the Engineer still had a chance to protect the County from the disastrous consequences of Interpace's use of defective, non-conforming materials. The specifications expressly required Interpace to perform wire and concrete tests specified under national standards and to then submit these test results to the Engineer. (AS 1, §15060, p. 15060-2; AS 1, §C-03; AS 3, §1.9). Interpace did not provide any such test results, and, astonishingly, the Engineer never requested them. (R 19926-27; AT 177).

Had these test results been submitted as required, the Engineer would have had time to correct any deficiencies. (R 5989-91). Indeed, the Engineer obviously wrote this provision into the Interpace contract precisely to assure a timely opportunity to see that the pipe was manufactured in accordance with its specifications. But, since the Engineer failed to require Interpace to submit those test results to it, the Engineer never learned of the deficiencies in the wire and concrete Interpace used.

The Engineer remarkably asserts that it did not breach its contract by allowing Class IV wire to be used because that wire satisfied the standards incorporated in its specifications. The Engineer does no more than reargue its case below, attacking the wealth of evidence at trial, which was accepted by the trial court, as merely "a chorus of so-called expert voices."[15] In fact, as the evidence plainly establishes, Interpace's "hybrid" Class IV wire did *not* conform to the national standards. The experts disparaged by the Engineer included, among others, the metallurgist who developed some of the first prestress wire in the United States and who

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15 In contrasting the trial court's treatment of its experts, the Engineer points to the trial court's acceptance of Mr. Edmunds' expert opinion, apparently suggesting that this demonstrated bias in favor of the County. Nowhere in its brief, however, does the Engineer argue to this Court that the trial court abused its discretion in admitting Mr. Edmunds' testimony.

Interpace asked to show it how to make prestress wire (R 4872), as well as the chief U.S. Steel metallurgist who authored parts of a book considered to be "the bible" of the steel industry. (R 21790-91). Their testimony was unequivocal that AWWA C301-72, which expressly incorporates
ASTM A227-71, did *not* permit the use of Interpace's Class IV wire. (R 11813-18, 21843-47).

Seeking to refute that expert testimony, the Engineer and Interpace presented testimony of representatives on the AWWA committee that the AWWA standard included Class IV wire. But it is uncontroverted that the *ASTM* sets wire standards in the first instance, *not* the AWWA, and the *ASTM committee member* who testified at trial was unequivocal that *that* committee refused to sanction this application of Class IV wire on both occasions Interpace requested its approval. (R 11587-11602). In another case involving Interpace's scheme, the Fourth Circuit affirmed a finding that Interpace's Class IV wire did not satisfy those national standards, pointedly observing there was no need for Interpace to request the ASTM committee's approval of the use of Class IV wire if it already was within the standards. *See City of Richmond v. Madison Management Group*, 918 F.2d 438, 447 (4th Cir. 1990).

In short, the "overwhelming evidence" on this factual dispute supported the County, not the Engineer. The trial court appropriately found, based on this evidence and consistent with the findings affirmed in *City of Richmond*, that Class IV wire did not comply with the national standard specified by the Engineer for the pipeline. (AJ 67-72).

The Engineer further argues that there was no breach of its contract as a result of the fact that the pipeline's operating pressure was only 100 psi, not 150 psi. The Engineer contended that the County's ten year Master Plan set the requisite operating parameters for this pipeline. As the Engineer had to concede, however, *its specifications* required an "operating pressure of 150 psi" for this pipeline. (R 13578; AS 1, §15060, p. 15060-1).

The Engineer's design engineer acknowledged that this specification designated the "maximum operating pressure at which the pipe is actually going to be operated." (R 13587, 13703). His testimony is consistent with the AWWA C301-72 definition incorporated by the Engineer into the Contract Documents, which states that the operating pressure the Engineer specified means the

pressure at which the line normally will be operated. (AS 3, §1.2.7.). Thus, the *specifications* the Engineer prepared for *this particular project* admittedly required a pipeline operating pressure of 150 psi, and the Engineer promised to judge the performance of the work according to the *specifications, not* the County's Master Plan.

The Engineer also conceded, as it had to, that this was the requirement "between Interpace and the County in that particular contract." (R 9661). As the court recognized, the design parameters in *that* contract were specified by *the Engineer*, and the Engineer would hardly have specified operating criteria that it had not in fact designed. If that were somehow the case, the Engineer should have so informed the County — especially since the County relied on those design parameters in contracting with Interpace. (*E.g.* R 12467-68). The Engineer did not do so, and it should not now be permitted to renounce the specified operating pressure.

Had the Engineer properly checked all of the design formulas set forth in the submittal sheets Interpace provided to it, it would have determined at the outset that the specified operating pressure would not be achieved. (R 7356-60; AT 177). But the Engineer did not implement the very check it had provided in order to protect the County. (R 9523-50). The trial court certainly did not err in finding that the Engineer breached its contract in this critical regard. (AJ 153).

The fact of the matter is, the Engineer was lulled by Interpace's long-time reputation in the industry and, for that reason, it did not take the necessary steps to protect the County against deficiencies in Interpace's work. (R 9202). Instead, the Engineer utilized personnel on this project who lacked expertise as to prestressed concrete pipe, and those persons then simply "went through the motions" of overseeing the manufacture of this pipeline. (R 9198, 14350-52, 14438). The Engineer's failure to exercise the vigilance it had been retained to provide permitted Interpace to use defective, non-conforming materials that resulted in the pipeline's premature failure. (AT 177). The trail court's findings as to the Engineer's serious breaches are well supported by the evidence, and they should not be disturbed on appeal.

One final point must be emphasized. *Many* of the contractual breaches found by the trial court (AJ 135-67) are *not* complained of on appeal. Because the Engineer has asserted no challenge to those findings, their correctness is conclusively estab-

lished. *Hillsborough County Aviation Authority v. Walden*, 196 So.2d 912, 913 (Fla. 1967). The judgment must be affirmed in light of these independent, unchallenged findings.

APPENDIX Y

Excerpts from Reply Brief of Appellant, CH2M HILL

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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Case No. 90-02027 and 90-2028

CH2M HILL SOUTHEAST.,

Appellant,

vs.

PINELLAS COUNTY, FLORIDA,

Appellee.
_____/

Reply Brief Of Appellant
CH2M Hill Southeast, Inc.

On Appeal From A Final Judgment
Entered In The Sixth Judicial Circuit
In And For Pinellas County, Florida

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II. Hill is not liable to the County under any theory of law.

A. Hill is not liable for breach of contract.

1. No merger of contracts.

The County has made two grave and deliberate omissions in its response to this issue. First, it has neglected to address the unrebutted fact that Hill's contract performance was limited to two, discrete activities, the first of which dealt exclusively with design services complete prior in time to Interpace commencing its manufacture of the pipe components (Item A services), and the second of which dealt with installation phase services (Item B services) which expressly stated that Hill did not guarantee the contractor's performance and which expressly excluded materials' testing and inspection services. Second, the County ignores the fact that it did not engage Hill to perform "resident engineering" services and, in fact, the County itself performed those services and inspected the pipe manufacturing process.

By turning a blind eye to the express divisions in the Hill Contract and the express proviso rejecting any obligation to test materials, the County has framed an insidious argument which concludes that Hill was to supervise and master the intricate process of producing component materials for the pipe. The underpinning of that argument consists of record citations to Item A services (relevant only to design of the pipeline) and to Item B services (related primarily to line installation) — contract provisions having nothing to do with oversight of the manufacturing process at Interpace's plant. Only by misusing these contract provisions is the County able to urge its hypothesis that the "contractor" identified in Hill's contract Items A and B is the equivalent of Interpace, and that the Hill Contract should be merged with the Interpace Contract for inspection duties.

The County's merger fiction runs hard up against the language of the Interpace Contract, which time and time again references Interpace as the "supplier" or "manufacturer", and not as a contractor. The few "contractor" references within the numerous pages of this agreement cannot reasonably be rationalized as manifesting Hill's intent — two years before the Interpace Contract was reformulated by the County and signed — that Interpace be equat-

ed with the term "contractor" in Hill's prior contract with the County. The fact is that the County's gerry-rigged Interpace Contract contained errors in draftsmanship, based largely on the fact the County switched gears to buy the pipe directly from Interpace rather than follow the customary method of hiring a general contractor to purchase and install the pipe.[16] The idea that the Hill and Interpace Contracts should be merged is based on the grand delusion that the "contractor" designation in both contracts legitimately refer only to Interpace.

The County's brief also conveniently omits any reference to the unchallenged facts that it — the County — performed all resident engineering services at the pipeline construction site, observed the manufacturing process, and tested pipe components manufactured by Interpace. That course of performance by County personnel vividly demonstrates that it personally undertook virtu-

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16 Contract references to Interpace as the "supplier" are legion. Those references are found in sections C-05 on payment, G-1 (the contract itself), G-4 on supplier progress payments, the General Requirements work summary of the "pipe supplier", (01010-1), the shop drawings clause for the "pipe supplier," (01010-3), and the Pipe and Fittings term for "pipe manufacture," (15060-1) (Rev), etc. (V. 128 at 19043). Numerous passages contrast duties of the pipe supplier (Interpace) with those of the contractor (Bumby & Stimpson). The section on Measurement and Payment (section 01900) refers to the "pipe supplier" and the distinct "installation contractor." (01900-1). Section 15060-2 (Rev) requires the "manufacturer" to provide reference identifications to the "contractor." Section 01010-3 advises that preconstruction conference attendees shall include "the Contractor for installation and the pipe supplier..." (V. 128 at 19043).

Additionally, the "General Construction Requirements" sections refer to contractor duties clearly not within the scope of Interpace's services. These include a "stake-out survey by the Contractor" and keeping "[a] copy of the contractor's field book." "The Contractor" is directed to have suitable instruments on the job "of each pipe-laying operating at all times." (15090-1)(rev). This summary perusal of the Interpace Contract shows it clearly envisioned Interpace to be the manufacturer or supplier, and the installation contractor (Bumby & Stimpson) to be the "contractor".

ally all of the engineering services identified in the Interpace Contract which are *now* said to have been Hill's obligations. The facts are (I) that the County knew (or should have known more) of the failings regarding Interpace's pipe segments that it now proclaims Hill should have guarded against, and (ii) that Hill had no contractual responsibility to guarantee against them. In short, there is no factual legitimacy to the County's attempted "merger" of the Hill and Interpace Contracts on either of the dual themes that Interpace was the designated contractor, or that Hill's authorship of the draft contract later used for the Interpace Contract identified duties which Hill were obligated to perform.

The County badly distorts the time and space context of the judicial decisions it cites in support of its merger theory. In one "supporting" citation, the Florida Supreme Court addressed a circumstance of two subcontracts entered on successive days by the same officer of a general contractor with two distinct subcontractors to perform the same services. *J.M. Montgomery Roofing Co. v Fred Howland, Inc.*, 98 So.2d 484 (Fla. 1957). In this odd circumstance, which the Court candidly acknowledged was not a natural one for application of a merger theory that normally requires identical parties to each agreement, the Court did no more than reverse a summary judgment and recommend that the trial court review the second agreement as parol evidence of the intentions of the parties to the first. That unremarkable result is elevated by the County into a grossly distorted, new theory for applying the merger doctrine to two contracts signed two years apart!

A second case actually proves the opposite of what the County proposes it established. In *Northwestern Bank v. Corner*, 275 So.2d 317 (Fla. 2d DCA 1973), the court construed together the terms of a loan agreement and a loan guarantee agreement executed only five days apart. [17] The opinion finds merger in a situation where, at the time the first-in-time guarantee was signed, the parties (including the guarantor) had already negotiated the terms of the second-in-time loan agreement which were later reflected in that agreement and proved to be appropriate defenses to payment of the guarantee.

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17 The County's brief has misread the opinion to suggest that the two agreements were executed thirty days apart.

This proves the exact opposite of what the County wants to prove. When the first-in-time Hill contract was negotiated with the County, it was expressly understood that the "contractor" referenced would be a traditional general contractor for both the pipe component purchase and pipe installing functions. (V. 77 at 11325-326). The Interpace Contract signed two years later had completely different terms and parties.

Other citations footnoted in this section of the County's brief are also off the mark. Only one warrants rebuttal discussion, since the County uses it both for merger and course-of-performance arguments. *Cushman v. Smith*, 528 So.2d 962 (Fla. 1st DCA 1988), involved a property sale where multiple sellers and one buyer/lessee exchanged contracts identical but for the name of the buyer. That was the only difference in the two agreements. The *Cushman* case patently has no relevance to an alleged merger or course-of-performance involving distinct contracts, years apart, differing in every term, in which performance on the first is satisfactorily concluded by a non-signatory to the second contract.

Another supposed "course of performance" case is also utilized incorrectly by the County, to make the point that an

> architect who prepared [a] contract between owner and contractor and assumed duties during course of construction assigned to [the] architect in that contract [was] held liable for failing to properly perform those duties.

(ABH at 20, n.8), *citing, General Trading Corp. v. Burnup & Sims, Inc.*, 523 F.2d 98 (3rd Cir. 1975). *General Trading* does not support the stated proposition. First of all, the decision reflects only that the owner and general contractor utilized a standard "AIA" contract, not that the architect prepared that agreement. Secondly, there was no express agreement between the owner and the architect. That is, the architect's duties were not definitively expressed in a contract between the owner and contractor. That document contained only a generalized expression of design conformity with certain applicable zoning requirements. The owner's negligence action against the architect rode strictly on the design services performed by the architect for the owner. That case does not involve — as does the present — a non-party drafter not bound by the contract's terms, where that non-party had a separate agreement iden-

tifying the scope of its obligations to the owner. The County uses *General Trading* like its other caselaw references, to create doctrines for liability out of whole cloth advocacy, and not from a reasoned analysis of decisional law.

Weakly related to the County's notion that the two agreements should be merged, or that the Hill Contract along obligated its to supervise the manufacturing process, are out-of-state cases cited for the contention that a court may construe "ambiguity" in an owner-architect contract by reference to the owner-construction contractor agreement. The threshold problem with this thesis is that the owner-engineer contract here is not ambiguous. The Hill Contract was divided into four discrete chronological phases, and the County is mixing apples and oranges when it seeks to imply manufacturing supervisory obligations into the terms governing design functions — especially when there exists an express negation of any responsibility for materials testing even within the scope of *construction*-related not manufacturing site duties. Nothing in these several out-of-state precedents would suggest that those courts or this court would reject the unambiguous terms of the Hill Contract, or ignore an express reservation against the testing of materials.

A further doctrinal reason differentiates those cases from this. Each involves claims of negligence against design architects where a reference to the general contractor's agreement was used to evaluate only a standard of care, not a contract obligation. In the case which appears to be a leading precedent in this context, the court found an architect *not* to have a duty to supervise the construction site in order to protect employees of general contractors from job-related injuries. *Reber v. Chandler High School District*, 474 P.2d 852 (Ariz. 1970). Interestingly, reference to the general contractor's agreement in *Reber* was unnecessary since the architect's contract terms negated any such supervisory obligation.[18] In a similar case, *Walker v. Wittenberg, Delony & Davidson, Inc.*, 412 S.W.2d 621 (Ark. 1966), the court looked to the general contractor's agreement to find that it was responsible for on-site supervision which precluded any inference of a duty on the part of the architect.

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18 In *Dickerson Construction Co. Inc. v. Process Engineering Co. Inc.*, 341 So.2d 646 (Miss. 1977), the court did use a "general administra-

These cases connote that a supervisory tort will arise when the architect or other design professional has the right to exercise day-to-day control over the manner in which the details of construction work are performed. *Reber*, 474 P.2d at 854. More traditional contractual clauses reflecting supervisory or inspection obligations of an architect are *not* deemed to establish this duty. This is instructive in regard to the County's contention that the contractual, four visits to the construction site found in Item B services under the Hill Contract created an obligation to supervise manufacturing plant services. *Reber* and its progeny dovetail quite well with Hill's position that a four-times-per-month presence at the construction site could hardly have in a practical sense contemplated oversight for manufacturing defects of Interpace. Since there was no contract obligation (or tort duty) for Hill to supervise manufacturing, there was certainly none to undertake an investigation into the fraudulent scheme the County claims was pursued by Interpace.

2. <u>No design breach in specifying AWWA C-301-72</u>.

County experts asserted at trial that class IV wire was not authorized under AWWA C-301-72, since by its terms it incorporated

referred to only one location for construction services and contained specific requirements that the contractor consult with the architect or have him present at the job site prior to undertaking certain tasks. In that very narrow circumstance, the court found reference to the general contractor's agreement supported a tort claim against the architect.ASTM A-227. The "plain meaning" premise of these experts is readily rejected from the very language of AWWA specification C-301-72, which states that:

> wire with specified minimum tensile strengths exceeding those in A-227, Class II, may be used if the wire meets the other requirements for Class II in that specification, *and the pipe design may be based on these higher strengths.*

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18 cont. tion of construction contracts" clause in the architect's agreement to find negligent breach of a supervisory duty over the work site. In that instance, however, the construction contract definitively

(V. 128 at 19041) (emphasis added). 19 As noted by Hill but ignored by the County, one of the County's own experts acknowledged that class IV wire can and does pass all specific A-227 test requirements. (HIB at 57). The interpretation of some County experts that C-301-72 only allows wire reaching the maximum ceiling for class II wire distorts the language of the standard, and is belied by the drafters of C-301-72. It also raises the rhetorical question: Why would AWWA C-301-72 do more than simply identify ASTM 227 if wire strengths already encompassed by ASTM 227 were all that it intended to permit?

The factual flaw in the County's reliance on ASTM standards, which discuss only classes I and II wire, is that ASTM sets only the general standard for mechanical wire. The AWWA standard, however, applies general wire standards to the manufacture of wire to be used in prestressed concrete pipe. The use of manufactured wire in pipelines is appropriately controlled by a standard specifically related to pipe manufacture — AWWA.

History is also relevant here. Hill prepared its design specifications for this project in 1976. In 1973, the ASTM committee had adopted a new standard specification — ASTM A648-73 — directly applicable to wire used in prestressed concrete pipe. ASTM 648-73 specifically references three classes of wire with minimum tensile strengths only, not maximums. (V. 128 at 19046). Although the AWWA standard had not yet been modified to acknowledge expressly the existence of ASTM 648-73 (since the AWWA committee had not by 1976 revised C-301), AWWA C-301-72 does make clear that ASTM documents containing "superseding specifications under a new number" — which would include ASTM 648-73 — shall apply. (V. 128 at 19041, § 10204). The County experts who testified uniformly relied on the outdated concept of a class II ceiling in ASTM 227.

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19 There is no disagreement on the fact that class IV wire has a higher minimum tensile strength than class II wire, and it can be manufactured to meet all class II requirements set forth in A-227.

Much of the "expert testimony" put on by the County on the AWWA-ASTM debate supported the conclusion that class IV wire was permissible. One of their experts conceded that in 1968 he was producing class III and class IV tensile strength wire as an acceptable component for prestressed concrete pipe which had tensile strengths exceeding class II maximums. (V. 79 at 11687-690). This expert conceded that an argument could be made that under the open ended ASTM-648 standard, higher tensile strengths (such as those normally associated with class IV) could be argued to fall under class III. (V. 79 at 11637-639). Bethlehem Steel, for example, sold wire well into the class IV tensile strength range which was satisfactorily incorporated in prestressed concrete pipe. (V. 79 at 11637-639).

There can be no question that in 1976, when Hill designed this pipeline, AWWA allowed the use of class IV wire in prestressed concrete pipe. This was precisely the sentiment of the only three witnesses who sat on the AWWA committee which authored C-301 (HIB at 57).

The County heavily relies for its anti-class IV wire argument on *City of Richmond v. Madison Management Group*, 918 F.2d 438 (4th Cir. 1990). This is not surprising, but badly misplaced. That case is not germane to the County's claim against Hill. The City of Richmond did not sue the design engineer. The design engineer's representative did not require class IV wire , and a standard of care regarding class IV wire was never addressed. *Id.* at 450, n.9. That case dealt only with Madison's having fraudulently induced the City to purchase pipe manufactured with a class IV wire which Madison knew could *not* meet proper performance standards, according to the jury's findings. There is nothing in that decision regarding a design engineer's standard of care in designating class IV wire — a vastly different issue of liability.

3. <u>No breach concerning operating pressure</u>.

With regard to another alleged design defect, the operating pressure of the pipeline, the County badly distorts the record facts. The 1973 master plan for the pipeline system (and the 1979 update) clearly evidenced that the line would be operated at pressures not exceeding 100 psi. (V. 219 at 26961; V. 224 at 27214). The evidence showed that the County would have had to make major modifications in the entire system in order to operate it at the 150 psi pres-

sure claimed at trial to be the requirement it had demanded. (HIB at 60, n. 33). In any event, the pipeline had passed numerous tests in which it sustained 150 psi pressures or above, (HIB at 11), and the laboratory test performed by County experts *post*-project (for litigation purposes) — intended to prove the fragility of the pipeline — actually proved the contrary when it did not blow until pressures exceeding 400 psi were reached. (V. 35 at 5164-69, 5213-17; V. 48 at 7165-66).

Nor did the specifications call for 150 psi operating pressures for the pipeline. Rather, they called for the *pipe segments* (not the pipeline) to be manufactured to meet 150 psi operating pressures with surges to 210 psi. (HIB at 60). This design was based on Hill's careful engineering, to ensure adequate safety margins above the master-plan-intended 100 psi pressure levels for normal operation. (V. 65 at 9630-31, 9661-62). No prudent engineer would require pipe manufacturing pressure equal to but not in excess of the normal operating pressure in the pipeline.

APPENDIX Z

Appellant's Initial Brief

Z - 2

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

PINELLAS COUNTY, FLORIDA
Appellant,

-vs- Appeal No. 93-01203

INTERPACE CORPORATION;
CLEVEPAK CORPORATION;
MADISON MANAGEMENT
GROUP, INC., as successor of
INTERPACE CORPORATION;
and CH2M HILL SOUTHEAST,
INC.,
Appellees.
_____/

APPELLANT'S INTIAL BRIEF

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PRELIMINARY STATEMENT

Appellant, PINELLAS COUNTY, a political subdivision of the State of Florida will be referred to as "Pinellas County."

Appellee, CH2M HILL SOUTHEAST, INC., a civil engineering firm, will be referred to as "Hill."

On May 21, 1993, this Court entered an order taking judicial notice of the entire appellate record arising from the first appeal in this litigation. That appellate record will be designated (R_).

The post-mandate record arising from the proceedings following this Court's decision and mandate in *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So. 2d 85 (Fla. 2d DCA 1992) will be designated (PR_).

Reference to Appellant's Appendix will be designated (A_).

STATEMENT OF THE CASE

On March 13, 1992, this Court rendered its decision, reversing a money judgment in favor of Pinellas County against Hill, in *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So. 2d 85 (Fla. 2d DCA 1992 ("*Hill I*").

The judgment against the manufacturer and civil engineer followed a nearly one-year long trial and concerned 13.5 miles of defective large diameter prestressed concrete pipe. That pipe transports over one-half of Pinellas County's daily water distribution needs.

The main focus of this Court's opinion in *Hill I* concerned the issue of disqualification of the sitting trial judge. *Hill I*, at 86-88. Holding that the trial court should be disqualified, this Court reversed.

Recognizing that certain issues could be resolved as a matter of law and within this Court's scope of review, the *Hill I* Court then made three important rulings. First, it determined that Pinellas County could not bring a negligence action against Hill, the professional engineers. Second, the Court held that the contract between Pinellas County and Hill on one hand and Pinellas County and Interpace, the pipe manufacturer, on the other hand — should not be merged so as to impose additional duties on Hill. Third, the *Hill I* Court opined that the Hill Contract imposed no duties on Hill to physically oversee the pipe manufacturing process. at 88-89.

Having disposed of those questions, this Court remanded for a new trial on the lone issue which Hill appealed, which could not be resolved as a matter of law, namely, whether Hill breached its contract by permitting the use of Class IV wire on Pinellas County's pipeline. *Id.* at 89.

The remand of this issue for retrial was appropriate because the disqualification of the trial judge had the effect of unraveling the entire first trial. The parties were then positioned as though no trial had occurred in the first instance.

On March 3, 1993, the new trial judge conducted the first meaningful post-*Hill I* mandate proceedings. At the hearing before the Honorable Howard P. Rives, both parties presented their views of the issues remaining to be tried. (PR 260-284)

Pinellas County urged that, in addition to the Class IV wire issue, several other breach of contract issues had been ini-

tially pled and should be retried. Because these issues had never been addressed to the Second District Court of Appeal in *Hill I*, Pinellas County maintained the doctrine of law of the case required no less. (PR 267-75)

On the other hand, Hill seized upon the language in *Hill I* directing retrial of the single wire issue, and argued that Judge Rives was constrained to try only that issue. (PR 277-78)

Misconceiving the proper application of the law of the case doctrine, the trial court accepted Hill's argument and entered the Final Partial Judgment, limiting the issue for retrial to the Class IV wire question. (PR 284-85)

Pinellas County appeals that post-mandate Final Partial Judgment and the denial of the Motion for Rehearing of it. (PR 243, 247)

STATEMENT OF FACTS

Pinellas County filed this lawsuit in 1983 against Hill and others, seeking money damages because a critical 13.5 mile water distribution pipeline was riddled with defects. (R 19382-394) The suit seeks replacement of the entire pipeline because of the massive defects and the critical function which it serves. (PR 4-49)

Hill, as predecessor to Black, Crow & Eidsness, was the civil engineer charged with substantial responsibilities as part of the project team. Hill is the one remaining defendant. The manufacturer is mired in the United States Bankruptcy Court.

Hill served for many years as the primary outside engineering consultant for the County. On March 27, 1975, Hill entered into a contract with Pinellas County to provide engineering services concerning the pipeline which is now the subject of this case. (R 1942, Exhibit 2; A Tab 1 pp. 1-12)

Among the duties which Hill assumed under its contract with Pinellas County were:

1) to staff itself with qualified personnel;

2) to make a route selection survey;

3) to do preliminary and final design plans and specifications;

4) to consult and advise regarding the need for subsurface exploration;

5) to consult and advise regarding laboratory testing of samples or material;

6) to consult and advise regarding inspection of samples or materials;

7) to act as the County's representative regarding any exploration, testing or inspection;

8) to prepare complete bases of design;

9) to prepare and furnish contract drawings, forms, specifications, schedules of quantities and detailed cost estimates;

10) to confer with and receive approval from other applicable agencies of government;

11) to advise prospective bidders, suppliers of construction materials, and equipment manufacturers;

12) to attend bid openings and make engineering recommendations regarding the award of contracts;

13) to visit the construction site 4 times per month on average;

14) to determine if work proceeded in accordance with contract documents;

15) to endeavor to protect the Owner against defects and deficiencies in the work;

16) to check shop drawings and description date as to general conformity to plans and specifications;

17) to approve pay estimates;

18) to consult and advise Pinellas County;

19) to issue Owner instructions to the contractor;

20) to prepare routine change orders;

21) to interpret the terms and conditions of the Contract Documents and judge the performance of them; and

22) to recommend final acceptance of the job. (A Tab 1, pp. 2-4)

After the first section of pipe burst in 1979, the County undertook an extensive investigation which was actually concluded many months after the institution of this lawsuit. (*See, e.g.*, Exhibit 71, R 19388) Based on the investigation, the County framed a Complaint. The first Amended Complaint set forth, among other things, the contract claims against Hill for breach of its direct contract with the County. (PR 4-49) (A 13-59) The Complaint alleged in excess of forty (40) failings by Hill all of which constituted departures from the contractual undertakings described above. Not only were these extensive breaches alleged — each were proven by the overwhelming weight of evidence presented in the first trial.

Specifically, only one Hill Contract issue, namely, the failure of Hill regarding Class IV wire, was ever appealed in *Hill I*. (PR 73-151)

The County offered proof at trial that J. M. "Dink" Henderson was the Hill engineer charged with design, approval of the materials, drafting of specifications and contract documents and other significant responsibilities. Henderson, the proofs reflected, had little experience (R 9197-9201, 9206-08, 9214-15, 13635-40, 13645, 13658-60); failed to account for groundwater and soil conditions; approved Interpace submittals and shop drawings — even though he knew little or nothing about Class IV wire, the national standards, or the design formulas. Henderson admitted that he did not check any of the design calculations submitted by Interpace before he signed off on them. (R 9465, 9503-04, 9514-17; 9522-9539, 9544, 9240, 9242-43, 9922-23, 9397-9402, 9507-11, 9512; 9566-67; 9579-82, 9598-99, 13702, 13713-15, 13728)

An expert for Construction Testing Laboratories testified that a review of the design formulas reflected that they were improper and that they revealed values which reflect that Brooksville aggregate could not be used. (R 7329-47) Hill engineers knew that Interpace intended to and did use Brooksville aggregate. (R 9541)

The pipe was underdesigned as to the working pressure of the pipe which should have operated sufficiently at 150 psi with an additional 60 psi surge protection. (R 9754; 9641-63)

The shop drawings Henderson reviewed cite a

national standard, ASTM A648-73. (R 19045) That national standard was not specified by Hill in the specifications Hill drew and is not sanctioned by the controlling *prestressed concrete pipe national* standard AWWA-C-301-72. Henderson ignored or failed to recognize this important deviation. (Exhibit 1, R 19041, 9507)

The shop drawings reflected Interpace's intent to use 17 gauge steel cylinders while 16 gauge should have been used. Hill missed this requirement as well. The effect of this error was that the pipe was under wrapped with wire, the key strength component of the pipe. (R 5906-07, 5911, 5915-17, 7460-61)

Hill approved the pipeline for final payment without requiring any test reports, mill reports, final affidavits or certificates of compliance from Interpace. (Exhibit 399, R 19448)

Hill ignored evidence of low ph in the groundwater in the environment in which the pipe was to be installed and, consequently, failed to recommend needed epoxy coating of the pipe. (Exhibit 326, R 19436, 10444)

Hill failed to conduct its required 4 visits to the job site on average per month. Had it done so, it could have readily detected improper curing of concrete and mortar by stencil markings on the inside of the pipe. (R 6001-02, 14629-35)

Hill failed to insist that the manufacturer submit material testing reports which the specifications required. Consequently, Hill never even received valuable information needed to discharge Hill's contract. (R 9955-56, 7463)

These proofs in many respects went unchallenged during the first trial. Taken together, they present a massive breakdown by Hill in the performance of its contract with Pinellas County. Each of these matters of pleadings and proofs call for resolution by a trier of fact. *None were appealed.*

The chart at Pages 15-18 of this Brief reflects a capsule of the contract issues raised by the pleadings and their appellate disposition. Simply put, Hill did not address even the tip of the breach of contact iceberg in its appeal in *Hill I.*

After the *Hill I* mandate issued, a hearing was conducted before Judge Howard P. Rives, the newly assigned judge.

Pinellas County presented the court with a packet of information including the First Amended Complaint, Hill's brief in *Hill I*, and this Court's decision in *Hill I.* (PR 1-151) Pinellas County urged that the *Hill I* directive to try only the Class IV wire issue had

to be read in context. The trial court was urged to consider the *Hill I* decision in light of the issues the *Hill I* Court was asked to decide. Because the *Hill I* Court had never been given the other contract issues to decide — its decision could not be read to pass on them. Further, the County urged, the procedural posture of the case was such that no fact issues were resolved in *Hill I* because the trial had been rendered a nullity. (PR 265-75)

Counsel for Hill urged a strict reading of *Hill I* and that this Court must have meant what it seemed to have said. (PR 277)

The trial court, misconceiving the effect of the law of the case doctrine, rejected Pinellas County's position and ruled that all other contract issues, whether or not appealed and considered, were foreclosed from consideration at the retrial. (PR 243, 284-85) This appeal ensued.

SUMMARY OF THE ARGUMENT

In *Hill I*, this Court reversed and remanded this case for a second trial, after disposing of certain issues as a matter of law and determining that the trial judge should have stepped down during disqualification proceedings.

The remand was for a new trial on the only fact issue which Hill appealed to this Court. Significantly, this Court was never asked to nor did it pass upon a host of other asserted contract breaches by the Engineer.

The law of the case doctrine makes clear that any issue not appealed and hence not decided is open for retrial after remand. *Two M Development Corp. v. Mikos*, 578 So. 2d 829 (Fla. 2d DCA 1991).

Common sense and logic suggest that if the Class IV wire issue was returned for retrial to a new trier of fact — then all other like contract issues, especially since they were never appealed — also merit a new trial. Thus, if for example, Pinellas County is entitled to a trial against the Engineer for allowing Class IV wire to be used on the pipe, it follows that Pinellas County should also have its day in court because the Engineer allowed the incorrect cylinder steel or aggregate to be used on the pipe.

Therefore, because Hill elected to raise only select issues for appellate consideration, it cannot now be heard to suggest that those issues never raised, decided, or tried should somehow have been concluded in its favor in *Hill I*.

To accept Hill's position would be to deny Pinellas County its day in court. Florida's guarantee of access to the courts and notions of due process require that litigants in Florida have the opportunity to be heard. Now that the first trial has been undone, Pinellas County is entitled to a trial on those issues which no trial judge or jury have decided and which this Court has never considered — because it was not asked to. Had the request been made in *Hill I* for review of the additional unmentioned contract breaches, the appropriate disposition was a remand for new trial just like the one contract breach which Hill did raise — the Class IV wire question.

In sum, a clarification of the issues to be tried is sorely needed.

ARGUMENT

I. THE TRIAL COURT IMPROVIDENTLY RESTRICTED THE ISSUES TO BE TRIED ON THE RETRIAL OF THIS ACTION.

In the face of the horrendous expense incurred to date, the public interest which is implicated, and the further judicial labors required — a proper definition of the issues remaining to be tried is imperative.

By focusing on certain language that this Court wrote in *Hill I* and not on the appellate issues actually decided in *Hill I*, the trial court has simply missed the mark by so narrowly restricting the issues which remain for disposition on retrial.

When this Court determined that the trial judge in *Hill I* erred by failing to step down under Florida rules pertaining to the disqualification of trial judges, the effect was clear. The final judgment was necessarily vacated and a new trial was required. The parties were returned to the same position they occupied immediately prior to the commencement of the first trial. Stated another way — the impact of the disqualification of the trial court is that for all practical purposes no trial ever happened. *See Bolt v. Smith*, 594 So. 2d 864 (Fla. 5th DCA 1992); *Whack v. Seminole Memorial Hosp., Inc.*, 456 So. 2d 561 (Fla. 5th DCA 1984)

Therefore, all issues which were up for grabs at the commencement of the first trial remain so — unless this Court disposed of any particular issue as a matter of law in *Hill I*.

Indeed, this Court did remove from consideration the negligence claim, the merger issue, and the contractual obligation of Hill to physically oversee the manufacturing process. These issues, this Court recognized were within the scope of its review function. Id. at 87-88.

Regarding the only issue appealed which required a resolution by a factfinder, the *Hill I* Court returned for a new trial:

> Additionally, the County asserted that Hill had reached its contractual design responsibilities by allowing the pipe manufacturer to use Class IV wire for the pipeline. That is an issue of fact which

must be determined in a new trial. Id. at 89 (emphasis added).

Nowhere in *Hill I* did this Court purport to conduct a factfinding mission or to otherwise usurp the role of the trial judge or jury, as the case may be. Instead, the *Hill I* Court paid careful attention to the boundaries of the appellate review function and sent back the one question appealed which this Court could not properly decide. *E.g. Coleman v. Florida Insurance Guaranty Ass'n*, 517 So. 2d 686 (Fla. 1988); *Atkins v. Litsinger*, 513 So. 2d 178 (Fla. 2d DCA 1987). Had this Court, for example, determined that the overwhelming evidence demonstrated a breach of contract by Hill for allowing unsanctioned, defective, outlawed wire to be used — no one would disagree that such a decision would do violence to respective functions of the trial and appellate courts of Florida. *Prevatt v. Prevatt*, 462 So. 2d 604 (Fla. 2d DCA 1985); *Williams v. Dolphins Reef, Ltd.*, 455 So. 2d 640 (Fla. 2d DCA 1984).

In logic, had any other fact issues been brought to the attention of the *Hill I* Court — without doubt this Court would have similarly sent those fact issues back for a retrial. Yet, the effect of the order on review and position urged by Hill on March 3 suggests the contrary.

At the hearing before Judge Rives, the initial appellate brief submitted by Hill in *Hill I* was filed which reflects the actual issues raised for consideration. (PR 77-151) The summary of the argument to this Court outlines only one Hill Contract issue for review — the use of Class IV wire. (PR 91-92) The argument portion of the Hill brief also raised only the Class IV wire issue as the sole contract question dependent on findings of fact. (PR 93-151)

The impression which the *Hill I* Court may have gleaned from among the 14,000 pages of transcript, 265 volumes of record and the Hill brief was that Class IV wire was the only breach of the Hill Contract asserted. To the contrary, however, the First Amended Complaint, on which the case was tried, asserts a host of contract failures by Hill. (PR 41-49; A Tab 2 pp. 51-59)

For example, just as Pinellas County contended that its engineers slept at the switch while a non-conforming seriously defective wire was included in the pipe other serious departures from standards and specifications occurred.

Prior to the commencement of pipe manufacture, Interpace sent a specification sheet to Hill for review. The Hill Contract expressly required the engineer to provide consultants and advise regarding laboratory testing and inspection of materials. It also required Hill to inspect shop drawings and to endeavor to protect the County against defects and deficiencies. It required Hill to judge the performance of Interpace.

Indeed, Hill undertook to do so. Following is the first page of the Interpace submittal:

INTERPACE Corporation | SPECIFICATION | NO. LC-77-1-1

FOR 60" PRESTRESSED CONCRETE EMBEDDED CYLINDER PIPE W/RUBBER & STEEL JOINT (SP-12)
WATER SYSTEM IMPROVEMENTS
PINELLAS COUNTY, FLORIDA
BLACK, CROW & EIDSNESS, INC. - ENGINEERS

SZE DRAWING INTERPACE Engineering Manual, Section 1, Pg. 7, Section 1, Page 9

Nominal Pipe Diameter - inches	60	60
Class Designation	A	A
Approximate Footage - feet	59,435	
Min.Cyl. t - ASTM A-569 (Min. Yield = 27,00 psi); or A-570-72 Gr. B or C; or A-611-72 Gr.C. or E-inch	0.0538	0.0538
Nominal Cylinder Diameter - inches	63	63
Cylinder Test Pressure - psi	43	43
Wire Size - ASTM A 227-71 and A 648-73	#8	#8
Wire Class	IV	IV
Wire Area - sq.in./ft. = (A_s)	0.403	0.437
No. of Wraps of Wire - per ft.	19.56	21.21
Min. Ultimate Wire Strength - psi = (f_{su})	293,000	293,000
Wire Wrapping Stress - psi = (f_{sg})	219,750	219,750
Dynamometer (1 wire) - lbs.	4,530	4,530
($A_s f_{sg}$) = (.75 $A_s f_{su}$) - lbs/lf. (See Note A)	88,559	96,031
Pressure at zero concrete compression - psi	171	178
Resultant Compression in Concrete - psi	1,090	1,330
Min. compressive strength of concrete at time of wrapping (Rodded or Vibrated Cylinders) - psi		
Core Thickness (including cylinder) - inches	4-1/2	3-3/4
Min. Coating Thickness - inches	7/8	7/8

Zinc Coated Joint Rings:		
Spigot Ring Width - inches	6-1/4	4-1/4
Bell Ring - inches x inches	1/4 x 6	1/4 x 6
Joint Depth - inches	4-1/4	4-1/4
Creep - feet	0.03	0.03
Average Laid Length - feet	20.03	20.03

Calculation Date: $n_i = 7.0$, $n_r = 6.0$, $R_1 = 0.05$, $R_2 = 0.05$, $C_r = 2.00$

Design Conditions: In Accordance with AWWA Specification C301-72		
Design Pressure - psi	150	150
Water Hammer Allowance - psi	60	60
Max. Cover - feet	6	6

NOTES:
1. All bevels and outlet pipe to be manufactured with 4-1/2" core.
2. For details on special fittings see Specification Sheet LC-77-1-4 and 5.
3. BELL BOLT Joints to be manufactured

NOTE A: Should material shortages require use of alternate size or strength wire, wire area, No. of wraps, wrapping stress and Dynamometer values will be varied as required to maintain the value of (Asfsq) as shown.

LJ06012160 LJ06012170

COMPILED____CHECKED____APPROVED____DATE_____

It reflects the sign off by Dink Henderson, the Hill engineer, in charge of design. Henderson, the proof at trial reflected, was woefully inexperienced, knew nothing of Class IV wire or much of anything else about SP-12 Interpace Prestress Concrete Pipe.

The specification sheets he reviewed and approved reflected improper standards references; improper cylinder steel; and should have raised all manner of sirens, red flags, bells and whistles regarding the aggregate to be used. Henderson and Hill knew Brooksville aggregate was to be used on Pinellas County pipe. The specification sheet reflects modular ratios that *could not* be achieved with Brooksville aggregate.

These claims were pled and substantial proofs exist and were offered as to each. Each claim requires a sifting of evidence and resolution by a trier of fact. Yet none of these issues were considered by the *Hill I* Court.

The following table capsulizes the Hill Contract claims and their appellate disposition:

STATUS OF BREACH OF CONTRACT ISSUES

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
1	Engineer responsible for duties imposed by manufacturing contract with Pinellas County	Yes	Reversed without remand
2	Engineer had duty to inspect manufacture of pipe	Yes	Reversed without remand
3	Engineer breached contract by allowing use of Class IV wire in pipe manufacture	Yes	Reversed and remanded for new trial

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
4	Engineer breached contract by failing to direct properly, to perform or to have performed soil survey investigations including, soil resistance to the flow of electric current, total soil acidity, soil drainage (ground water fluctuations), soil texture, soil microbial activity and soil chemistry	No	None
5	Engineer breached contract by failing to direct properly, to perform or to have performed corrosion testing to determine effects of local soil corrosion conditions on the rate of corrosion of pre-stress steel wire embedded in mortar	No	None
6	Engineer breached contract by failing to direct properly, to perform or to have	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
	performed investigations of the pipeline route for stray electrical currents, low soil resistivities and aggressive soil and groundwater conditions		
7	Engineer breached contract by allowing specifications that did not require the wire to the ductile	No	None
8	Engineer breached contract by approving pipe designs with inadequate safety factors	No	None
9	Engineer breached contract by failing to review design calculations for the individual sections of pipe	No	None
10	Engineer breached contract by allowing the manufacturer to specify ASTMA-648-73, which is not recognized nor sanctioned in AWWA-	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
	C-301-72		
11	Engineer breached contract by approving the use of 17-gauge cylinder steel instead of the specified 16-gauge cylinder steel	No	None
12	Engineer breached contract by specifying only absolute minimum standards and specifications, thereby permitting defective pipe to be made	No	None
13	Engineer breached contract by failing to review all project documents submitted to Pinellas County by the manufacturer	No	None
14	Engineer breached contract by failing to specify or to have performed sufficient inspection and testing of materials used in the manufacture of the pipe to ensure the pipe would be manufactured	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
	and delivered as required by the specifications		
15	Engineer breached contract by failing to inquire of the manufacturer concerning the use of admixtures that were used in the manufacture of the pipe	No	None
16	Engineer breached contract by having no knowledge of the use of admixtures and failed to inspect the use of admixtures	No	None
17	Engineer breached contract by failing to require the manufacturer to perform any additional tests not specifically mentioned in the standards and specifications, but necessary to ensure the quality and the safety of the manufactured pipe	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
18	Engineer breached contract by failing to require that test results of the manufacturer and affidavits or certifications of compliance by the manufacturer be supplied for review	No	None
19	Engineer breached contract by certifying completion of the project without receiving affidavits and certifications of compliance	No	None
20	Engineer breached contract by failing to specify acceptance inspection procedures adequate to identify defective pipe	No	None
21	Engineer breached contract by failing to inspect the work properly	No	None
22	Engineer breached contract by failing to identify incorrect pipe	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
	loading and unloading techniques		
23	Engineer breached contract by failing to require the manufacturer to provide samples and specimens of pipe manufactured materials as provided for in the standards and specifications	No	None
24	Engineer breached contract by failing to examine and test materials, samples and specimens	No	None
25	Engineer breached contract by failing to require the manufacturer to provide an affidavit and certifications of compliance at the end of the project	No	None
26	Engineer breached contract by failing to require proper repairs to pipe damaged during transportation or	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
	installation		
27	Engineer breached contract by failing to detect the pipe coating material was mortar rather than concrete as required in the specification	No	None
28	Engineer breached contract in failing in designing the system to provide for sufficient flexibility which would allow Pinellas County to operate the pipeline at working pressures up to 150 psi	No	None
29	Engineer breached contract by failing to design the system to include a sufficient surge pressure margin or surge protection facilities adequate for the surges which the pipeline will be subjected	No	None
30	Engineer breached contract by failing to	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
	design the surge protection facilities properly which were provided, specifically, defective air and vacuum-valve assemblies		
31	Engineer breached contract by failing to take into consideration and to design to prevent the probability that surges would be induced in the pipeline through the operation and the interaction between the Cypress Creek pump station, SK Keller Pump Station, and North Booster station	No	None
32	Engineer breached contract by failing to forewarn Pinellas County that the operation or modification of pumps, motors, drives, valves, actuators, and other appurtenances in the	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
	pump stations, when acting individually or together, could result in damaging surges being introduced into the pipeline		
33	Engineer breached contract by failing to design, recommend, or advise as to the need for instrumentation to monitor for surges which could damage the pipeline and which could be produced by the operation and interaction between the three pump stations	No	None
34	Engineer breached contract by failing to draft a requirement in the contract between Pinellas County and the manufacturer that the manufacturer provide all test results as required to be performed under AWWA-C-301-72	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
35	Engineer breached contract by failing to require in the contract between Pinellas County and the manufacturer an affidavit and certification of compliance as provided for in AWWA-C-301-72	No	None
36	Engineer breached contract by failing to provide provisions in the contract between Pinellas County and the manufacturer that would give a sufficient warranty	No	None
37	Engineer breached contract by failing to provide in the contract between Pinellas County and the manufacturer a proper protection clause and recourse against the manufacturer in the event a defective product was supplied	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
38	Engineer breached contract by failing to inform Pinellas County of its knowledge and understanding that the pipeline would only be expected to last approximately 50 years while the manufacturer consistently maintained that the pipeline would last either indefinitely or at east 100 years	No	None
39	Engineer breached contract by failing to exercise due care in reviewing submittals from the manufacturer which described the prestressed concrete pipe the manufacturer intended to manufacture	No	None
40	Engineer breached contract by allowing the manufacturer to manufacture a lesser quality pipe than was called for in the specifications	No	None

	ISSUES PLEAD BY PINELLAS COUNTY AS BREACH OF CONTRACT	WHETHER ISSUE APPEALED BY ENGINEER	DISPOSITION OF ISSUE
41	Engineer breached contract by failing to reject shop drawings submitted by the pipe manufacturer which included the specification of ASTMA 648-73 which allegedly permitted the manufacturer to use Class IV wire	No	None
42	Engineer breached contract by failing to require the manufacturer to meet the requirements of the contract specifications and of section 1.9 of AWWA-C-301-72, requiring the provision of wire test specimens and other steel test specimens to the purchaser or its agent	No	None

A. The Doctrine Of Law Of The Case Mandates Retrial Of Those Issues Not Appealed And Not Decided.

The remand for retrial of the Class IV wire issue reflects this Court's recognition that any fact questions regarding Hill's performance of its contract are fair game for retrial. Had Hill pointed out to this Court that Pinellas County also challenged Hill's contract performance by allowing the use of improper aggregate, the wrong cylinder steel, the wrong national standards, the wrong mortar coating, the wrong testing protocol, the use of improper coating and so on, the result would have been exactly the same. This Court would have immediately recognized the need for a trial on these issues. But Hill *did not* appeal these contract claims.

And it was not necessary for this Court to specifically direct a retrial on issues it was never asked to consider. The law of the case doctrine supplies the proper direction to trial courts under these circumstances.

In *Two M Development Corp. v. Mikos*, 578 So. 2d 829 (Fla. 2d DCA 1991) this court clearly articulated the law of the case doctrine. In Mikos a disgruntled taxpayer challenged a tax assessment on two grounds. In the first *Mikos* trial, the taxpayer won on a single dispositive claim. This court reversed and remanded for new proceedings, without a clear directive that the taxpayer could have a new trial on the second prong of his attack on the assessment. The trial judge, taking much the same position as Judge Rives has adopted in the instant proceedings, ruled he had no jurisdiction to proceed to trial on the remaining claim. This Court reversed reasoning:

> The doctrine of the law of the case applies to issues that were *actually considered and decided* on a former appeal involving the same action... . In this case, however, we were not asked to nor did we consider the question . . . *Id.* at 830-31 (citations omitted) (emphasis supplied).

As a result, the *Mikos* court held the prior opinion did not preclude the trial court from considering the merits of the open point. *Id.* at 831.

Mikos and the long line of law of the case decisions teach that on remand for a new trial only those issues actually *appealed and considered* are resolved with finality. *Accord Greene v. Massey*, 384 So. 2d 24 (Fla. 1980); *Barry Hinnant, Inc. v. Spottswood*, 481 So. 2d 80 (Fla. 1st DCA 1986); *Tri Par Land Development Corp. v. Henthorn*, 241 So. 3d 429 (Fla. 2d DCA 1970); *Goodman v. Olsen*, 365 So. 2d 393 (Fla. 3d DCA 1978).

In *Sax Enterprises v. David and Dash, Inc.*, 107 So. 2d 612 (Fla. 1958), the Florida Supreme Court had earlier reversed a money judgment and remanded for new trial. Confusion arose after the first remand concerning the effect of the Supreme Court's first decision. The *Sax* court wrote:

> [A] judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided ... *Id.* at 613

The court went on to recognize that in some circumstances a particular holding is implicit in the decision rendered. Then the question may be foreclosed from further consideration. *Id.* at 613.

In the instant case, this extension to the law of the case doctrine has no application. Nothing in *Hill I* remotely suggests that other fact issues regarding Hill Contract breaches have been foreclosed. No issue was appealed and expressly decided which somehow subsumes the remainder of Pinellas County's breach of contract action. Thus, *Sax* and cases like it, which allow for a common sense application of the law of the case doctrine, provide no solace to Hill in this case.

For these reasons, this Court should reverse the Partial Final Judgment and remand with clear directions to the trial court that all breach of the Hill Contract issues fairly raised by the pleadings are fair game for retrial.

II. THE EFFECT OF JUDGE RIVES' DECISION IS TO DENY PINELLAS COUNTY FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Because of the disqualification of the trial judge in *Hill I*, the case has necessarily been returned to the status quo that existed immediately prior to the beginning of the first trial. Again, it is as though no trial has ever been held.

While Pinellas County may respectfully disagree with certain of the *Hill I* rulings on purely legal issues — it recognizes that those issues have been decided after full review. As to those issues never appealed and never decided — Pinellas County has never been heard.

The County has asserted a breach of contract action against Hill for serious departures from the Hill Contract which go far beyond Hill's approval of the wire component of the pipe. As to those questions, Pinellas County has a fundamental right to be heard.

In *Psychiatric Associates, P.A. v. Siegel*, 567 So. 2d 52 (Fla. 1st DCA 1990), a doctor challenged a statute which imposed certain impediments to bringing a state court action. Applying Section 21, Article 1 of the Florida Constitution — Florida's guarantee of access to the courts — the court recognized a litigant's guaranteed right to a forum in which to litigate a recognized cause of action.

The Siegel court approved the dissent in *Guerrero v. Humana, Inc.*, 548 So. 2d 1187 (Fla. 4th DCA 1989) in which Judge Anstead wrote:

> Under the Florida Constitution, access to the courts is a fundamental right.
>
> * * * * *
>
> [C]learly the intent of the access provision is to provide a broad guarantee of access regardless of the nature of the dispute. While the provision may not guarantee a litigant a particular remedy when the litigation is argued, it does guarantee

> a litigant who has a recognized cause of action a forum in which to be heard. 548 So. 2d 1187-88.

In the instant case, if Hill is correct, Pinellas County will be foreclosed from prosecuting the bulk of its common law contract action even though no trial court has ever disposed of the claims on the merits. And certainly this Court in *Hill I* did not do so because the questions were not appealed, briefed, argued, considered or passed upon.

Such a result also offends notions of due process under the State and Federal Constitutions. *E.g., Scholastic Systems v. LeLoup*, 307 So. 2d 166 (Fla. 1974); *Fickle v. Adkins*, 394 So. 2d 461 (Fla. 3d DCA 1981).

In *Wilson v. Pest Control Comm'n*, 199 So. 2d 777 (Fla. 1st DCA 1967), the court quoted Daniel Webster on the essence of due process:

> Due process of law means a law which hears before it condemns, which proceeds upon inquiry and renders judgment after trial ... *Id.* at 780.

All that Pinellas County respectfully requests is the opportunity to be heard on those questions which now have never been heard.

CONCLUSION

Appellant, Pinellas County, contends that the law of the case doctrine and the fundamental right to a trial requires reversal of the Final Partial Judgment. This cause should be remanded with directions to retry all breach of contract issues against Hill, arising under the Hill Contract, which are fairly raised by the pleadings.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to BENJAMIN H. HILL, III, ESQ., Post Office Box 2231, Tampa, Florida, 33601, this day of June, 1993.

_____

MICHAEL J. KEANE

AGREEMENT

BETWEEN

BLACK, CROW & EIDSNESS, INC.
CONSULTING ENGINEERS

AND

BOARD OF COUNTY COMMISSIONERS
PINELLAS COUNTY, FLORIDA

Z - 40

AGREEMENT

THIS AGREEMENT, made and entered into by and between Pinellas County, a political subdivision of the State of Florida, hereinafter called the "Owner," and BLACK, CROW AND EIDSNESS, INC., a nationally known and recognized engineering firm, a corporation chartered and existing under the laws of the State of Florida, hereinafter called the "Consulting Engineers," on the date appearing on the last page hereof

WITNESSETH:

That for and in consideration of the covenants and promises to be carried out by each party herein, it is agreed by and between the parties hereto as follows:

WHEREAS, the Owner contemplates the need for improvements to its water system;

WHEREAS, the Consulting Engineers are staffed with qualified engineering personnel versed in the field(s) of Environmental Engineering as well as other fields of municipal engineering; and

WHEREAS, the Owner has need for the services of the Consulting Engineers in connection with sixty inch water transmission main as described in the Ten Year Master Plan (Project 271-71-51), revised August, 1973, as well as other services of the Consulting Engineers from time to time for reports, design, professional services during construction and/or consultation;

NOW, THEREFORE, the Owner does hereby employ said Consulting Engineers to perform engineering services in connection with sixty inch water transmission main as described in the Ten Year Master Plan (Project 271-71-51), revised August, 1973.

The Consulting Engineers agree to make a route selection survey considering at least three (3) separate routes, preliminary design, final design plans and specifications for the project known as Sixty Inch Water Transmission Main as described in the Ten Year Master Plan (Project 271-71-51), revised August, 1973.

These services to include the following.

ITEM A - DESIGN IMPROVEMENTS

Upon receipt of specific written authorization by the Owner to the Consulting Engineers for the design of such improvements as may be designated, the Consulting Engineers will, with reasonable diligence, design authorized improvements specifically as follows:

1. Provide consultation and advise as to the necessity of providing or obtaining other services such as property, boundary, right-of-way, topographic and utility surveys, core borings, probings or subsurface explorations, hydrographic surveys, laboratory testing and inspection of samples or materials, or special consultation, and act as the Owner's representative in connection with any such services.

2. Prepare complete bases of design, together with statements of allowances, assumptions, and factors in order that the Owner may secure approval of such governmental authorities as have jurisdiction over design criteria applicable to the project.

3. Prepare and furnish contract drawings, contract forms (subject to the approval of the Owner's attorney), specifications, schedules of quantities, and detailed estimates of cost of the proposed improvements. The detailed plans and specifications will be made available to the Owner in 5 copies. Additional copies will be furnished to the Owner if requested, at the cost of reproduction plus reasonable handling charges.

4. Confer with officials of state or federal agencies having jurisdiction during the preparation of the plans and specifications, and assist the Owner in obtaining approval of the same.

5. Place copies of the plans and specifications on view in the Consulting Engineers' office and in offices of several certified builders' exchanges, and advise prospective bidders, suppliers of construction materials, and equipment manufacturers.

6. Attend bid openings and assist the Owner in tabulating and canvassing construction proposals, and make engineering recommendations in awarding of construction contract or contracts.

It is specifically understood that the services to be furnished under DESIGN OF IMPROVEMENTS do not include property, boundary and right-of-way surveys, or the makings of borings or soil bearing tests.

ITEM B - PROFESSIONAL SERVICES DURING CONSTRUCTION

Upon receipt of specific written authorization by the Owner, following the award of the construction contract for the proposed program of improvements, or undertaking the construction of these improvements by the Owner's forces, the Consulting Engineers will perform the following professional services during construction:

1. An average of 4 visits per month to the construction site during construction to determine if the work is proceeding in accordance with the Contract Documents. By means of these visits the Consulting Engineers will endeavor to protect the Owner against defects and deficiencies in the work of the contractor. This shall not imply guarantee of the contractor's performance.

2. Check shop drawings and descriptive data submitted by the contractor as to general conformity to the plans and specifications.

3. Approval of pay estimates.

4. Consult and advise with the Owner, act as the Owner's representative, issue all instructions of the Owner to the contractor, prepare routine change orders as required and act as interpreter of the terms and conditions of the Contract Documents and judge the performance thereunder. Whenever the Consulting Engineers consider it necessary or advisable to effect proper carrying out of the intent of the Contract Documents, they may, as the Owner's representative, direct the contractor to stop work or require special examination or testing of the work.

5. Prepare and submit routine proposed contract change orders. For purposes of this agreement the term "routine change order" is defined as a change not substantially altering the scope of work.

6. Following a final inspection with the Owner's representatives, representatives of any governmental agencies having jurisdiction, and representatives of the contractor, recommend as to final acceptance of the construction work.

7. Furnish 2 sets of complete prints for each construction contract, showing changes made during the construction process based on information furnished by the construction contractor to the Consulting Engineers.

It is specifically understood that the services to be furnished under PROFESSIONAL SERVICES DURING CONSTRUCTION do not include the testing of materials or the furnishing of resident project representatives, field engineers, and inspection personnel.

ITEM C - RESIDENT PROJECT REPRESENTATION

The Consulting Engineers shall, if authorized by the Owner, furnish the services of a resident engineer and inspectors as required to observe the construction work of the contractor on a daily basis. The said observation of construction shall include field observation field inspection of materials and work, preparation of

details for the prosecution of the work, preparation of daily progress reports, monthly summaries, and the review and verification of all partial and final estimates for payments to contractors. Monthly progress reports shall include the critical path method of reporting.

Through on-site observations of the work and progress, and field checks of materials and equipment by the resident engineer and inspectors, the Consulting Engineers will endeavor to provide for the protection of the Owner against defects and deficiencies in the work, but the furnishing of such resident engineers and inspectors shall not make the Consulting Engineers responsible for the contractor's failure to perform the construction work in accordance with the Contract Documents.

ITEM D - SUPPLEMENTARY SERVICES

If authorized in writing by the Owner, the Consulting Engineers will furnish or obtain from others additional services of the following types:

1. Furnishing property, photogrammetric, boundary, right-of-way, profiles, cross sections, horizontal and vertical surveys, topographic and utility surveys and hydrographic surveys.

2. Soils, foundation and materials engineering services including borings, probings or subsurface explorations, laboratory testing and inspection of samples of materials and other special consultation.

3. Biological consultations, bioassays, ecological impact evaluations and related environmental services.

4. Making drawings from field measurements of existing construction when required for planning additions or alterations thereto.

5. Additional services due to significant changes in general scope of the project or its design including, but not limited to, changes in size, complexity or character of construction.

6. Revising previously approved studies, reports, design documents, drawings or specifications.

7. Preparing documents for alternate bids requested by the Owner for work which is not executed.

8. Preparing detailed renderings, exhibits or scale models for project.

9. Furnishing additional copies of reports and additional prints of drawings and specifications.

10. Investigations involving detailed consideration of operation, maintenance and overhead expenses; and the preparation of rate schedules, earnings and expense statements, feasibility studies, appraisals and valuations; detailed quantity surveys of material and labor; and material audits or inventories required for certification of force account construction performed by the Owner.

11. Additional or extended services during construction made necessary by (1) work damaged by fire or other cause during construction; (2) prolongation of the construction contract time by more than twenty percent (20%); (3) acceleration of the work progress involving services beyond normal working hours; and (4) contract default due to delinquency or insolvency.

12. Additional services and costs necessitated by out-of-town travel required of the Consulting Engineers other than visits to the project as required by this Agreement.

13. Serving as expert witness for the Owner in any litigation or other proceeding involving the project.

14. Additional services in connection with the project not

otherwise provided for in this Agreement.

ITEM E - THE OWNER'S RESPONSIBILITIES

It is understood the Owner will:

1. Provide full information as to its requirements for the project.

2. Assist the Consulting Engineers by placing at their disposal all available information pertinent to the site of the project, including previous reports and any other data relative to design and construction of the project.

3. Designate a person or persons in writing to serve as the Owner's representative with respect to the work to be performed under this Agreement.

4. Guarantee access to and make all provisions for the Consulting Engineers to enter upon public and private lands as required for the Consulting Engineers to perform their work under this Agreement.

5. Examine studies, reports, sketches, estimates, specifications, drawings, proposals, and other documents presented by the Consulting Engineers and render decisions in writing pertaining thereto within a reasonable time so as not to delay the services of the Consulting Engineers.

6. Advertise for proposals from bidders, open the proposals at the appointed time and place, and pay for all costs incidental thereto.

7. Provide such legal, accounting and insurance counseling services as may be required for the project.

8. Give prompt written notice to the Consulting Engineers whenever the Owner observes, or otherwise becomes aware of, any defect in the project.

9. Obtain approval of all governmental authorities having jurisdiction over the project and such approvals and consents from such other individuals or bodies as may be necessary for completion of the project.

10. Obtain all properties, easements and rights-of-way necessary for the work.

11. Furnish or direct the Consulting Engineers to provide at the Owner's expense, necessary SUPPLEMENTARY SERVICES.

ITEM F - FEES AND PAYMENTS

1. For the route selection survey and those services enumerated under Item A, Design of Improvements, and Item B, Professional Services During Construction, the Owner agrees to pay and the Consulting Engineers agree to accept as full compensation thereof, fees equal to 5.62% of the construction cost.

Construction cost is defined as the actual cost of the work, exclusive of land and right-of-way, engineering inspection, and Owner's overhead.

The Owner may make progress payments in accordance with the A.S.C.E. manual, Reports of Engineering Practice No. 45, 1972. However, a payment of 80% of the total engineering fee shall be due and payable upon completion and submission of final plans and specifications, based upon a detailed construction cost estimate to be submitted with said final plans and specifications, with the understanding that any fees so paid, as computed from the detail estimated cost, will be adjusted to the actual construction costs as these become known. If the Owner deletes a portion of the work from the project after the design of the portion has been completed by the Consulting Engineers, then the fee shall be 4.50 percent of the detailed construction estimate for such portion. If the construction work

does not proceed within a period of twenty-four (24) months after the submission of the detailed plans and specifications to the Owner, then the final fee for design services shall be 4.50 percent of the detailed estimated cost.

Upon submission of the plans and specifications to the Owner, and upon their acceptance, should any revision to change the nature or scope of the work be necessary, the Consulting Engineers shall be compensated for making such alterations and additions to the detailed plans and specifications as authorized by the Owner, said compensation being on a Cost-Plus basis as hereinafter defined.

2. The balance of the fee shall be for Item B, Professional Services During Construction, and shall be paid monthly in proportion to the value of work completed.

3. For services of RESIDENT PROJECT REPRESENTATION (Item C) and inspection, which are authorized, the Owner agrees to pay and the Consulting Engineers agree to accept as full compensation for the furnishing of resident inspection an amount payable monthly equal to the payroll or salary cost of such resident engineer and inspector or inspectors, times a factor of 2.0 to provide general overhead and profit, plus transportation costs of $0.18 per mile. The Owner shall have the right to review and approve the qualifications and salary costs paid to the resident engineers and inspectors.

4. Payment for SUPPLEMENTARY SERVICES (Item D) shall be paid monthly upon presentation of the Consulting Engineer's detailed statement as follows:

Where supplementary services are of a nature so as to be performed by personnel assigned to established offices of the Consulting Engineers, the Consulting Engineers will receive compensation on a Cost-Plus basis as hereinafter defined.

ITEM G - DEFINITIONS

1. Cost-Plus is defined as payroll or salary cost plus one hundred and fifty percent (150%) plus reimbursable expenses.

2. Payroll or salary cost shall be defined by the ASCE - Manuals and Reports on Engineering Practice - No. 45, 1972, as follows:

> *Salary cost is defined as the cost of salaries (including sick leave, vacation, and holiday pay applicable thereto) of engineers, technicians, draftsmen, stenographers, surveymen, clerks, etc., for time directly chargeable to the project plus unemployment, excise, and payroll taxes, and contributions for social security, employment compensation insurance, retirement benefits, and medical insurance benefits.*

3. Reimbursable expenses shall mean the actual expense of transportation and subsistence of principals and employees when traveling in connection with the project, toll telephone calls and telegrams, reproduction of reports, drawings and specifications, and similar project related items, plus 15% to provide for applicable general overhead. Reimbursable expenses with respect to automobile travel by company or personnel-owned vehicles shall be charged at the rate of $0.18 per mile.

ITEM H - GENERAL CONSIDERATIONS

1. *Ownership of Documents*

All documents, including original drawings, estimates, specifications, field notes and data, shall be the property of the Owner. The Owner shall have the right to reuse the same for extensions of this project of this project or for

new projects, without the written permission of the Consulting Engineers and without paying any further compensation to said Consulting Engineers. Any reuse without specific written verification or adaptation by the Consulting Engineers will be at the Owner's sole risk and without liability or legal exposure to the Consulting Engineers.

2. *Estimates*

The Consulting Engineers have no control over the cost of labor and materials, or over competitive bidding and market conditions, and the estimates of construction cost provided for herein are made on the basis of their experience and qualifications. The Consulting Engineers do not guarantee the accuracy of such estimates as compared to the contractor's bids or the project construction cost.

3. *Work by the Owner's Forces*

In the event the Owner elects to construct a portion or portions of the improvements planned by the Consulting Engineers with the Owner's own forces, the total construction cost to be used in determining the Consulting Engineer's compensation under Item F shall be provided under Item F, Paragraph 1, together with the Consulting Engineers' estimate for the portion(s) of the work done by the Owner's forces.

The Owner reserves the right to have qualified county personnel perform engineering services under Items C and D on this project without compensating the Consulting Engineers for these services where the Owner has given written notice to the Consulting Engineers prior to the Consulting Engineers rendering such services.

4. *Insurance*

The Consulting Engineers shall secure and maintain coverage as will protect them from claims under the Workmen's Compensation Act and from claims for bodily

injury, death, or property damage which may arise from the performance of their services under this Agreement.

5. *Successors and Assigns*

The Owner and the Consulting Engineers each binds himself and his partners, administrators and assigns to the other party of this Agreement and to the partners, successors, executors, administrators, and assigns of such other party, in respect to all covenants of this Agreement. Except as above, neither the Owner nor the Consulting Engineers shall assign, sublet or transfer his interest in this Agreement without the written consent of the other. Nothing herein shall be construed as creating any personal liability on the part of any officer or agent of any public body which may be a party hereto.

7. *Termination of Contract*

This Agreement may be terminated at any time by either party hereto. Written notice of intent to terminate shall be given by either party hereto to the other party at least 30 days prior to the date of final termination. In the event of such termination, the Consulting Engineers shall be fully compensated under the provisions of this Agreement for all work performed and services rendered prior to the date of final termination.

8. *Contingent Fees*

The Consulting Engineers warrant that they have not employed or retained any company or person, other than a bona fide employee working solely for the Consulting Engineers, to solicit or secure this Agreement, and that they have not paid or agreed to pay any person, company, corporation, individual or firm, other than a bona fide employee working solely for the Consulting Engineers, any fee, commission, percentage, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement.

9. *Transportation Costs*

The Owner shall not reimburse the Consulting Engineers for the cost of transportation outside Pinellas County except where such travel is authorized by the Owner under Supplementary Services.

10. *Project Coordinator*

The Consulting Engineers shall provide, at no additional cost to the Owner, a project coordinator who shall coordinate all phases of the engineering services to be performed herein, including supplementary services.

ITEM K - EXECUTION

IN WITNESS WHEREOF, the Owner has caused this instrument to be executed on behalf of its proper officers of the Board of County Commissioners, their seal hereunto affixed and attested by witnesses whose names are subscribed opposite each respective signature, and the Consulting Engineers have caused this instrument to be executed in their names by their duly authorized officers and under corporate seals affixed this 24th day of March, 1975.

Owner:
BOARD OF COUNTY
COMMISSIONERS
PINELLAS COUNTY,
FLORIDA

ATTEST: HAROLD MULLENDORE,
CLERK

_____ By_____
Title Chairman

By _____

Consulting Engineers:
BLACK, CROW AND
EIDSNESS, INC.

ATTEST

_____ By_____

Corporate Secretary Title Vice President

APPROVED AS TO FORM AND
CORRECTNESS

_____

Owner's Attorney

APPROVED AS TO
FORM AND CONTENT:

_____

Black, Crow and
Eidsness,
Inc. - Counsel

Exhibit 2 to Appendix Z

Excerpts of the First Amended Complaint for Negligence, Breach of Contract, Breach of Implied Warranty of Fitness for Particular Purpose, Breach of Implied Warranty of Merchantability, Strict Liability in Tort, Fraud, and Punitive Damages

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
Circuit Civil No. 83-13313-08

PINELLAS COUNTY,

Plaintiff

vs.

INTERPACE CORPORATION,
CLEVEPAK CORPORATION, AND
MADISON MANAGEMENT GROUP, INC.,
AS SUCCESSORS OF INTERPACE
CORPORATION; AND CH2M HILL
SOUTHEAST, INC.,

Defendants.
_____/

FIRST AMENDED COMPLAINT FOR NEGLIGENCE, BREACH OF CONTRACT, BREACH OF IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE, BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY, STRICT LIABILITY IN TORT, FRAUD, AND PUNITIVE DAMAGES

The Plaintiff, PINELLAS COUNTY, by its undersigned attorney, sues the Defendants, INTERPACE CORPORATION, a foreign corporation; CLEVEPAK CORPORATION, a foreign corporation, and MADISON MANAGEMENT GROUP, INC., a foreign corporation, as successors of INTERPACE CORPORATION; and CH2M HILL SOUTHEAST, INC., a Florida corporation, and avers:

COUNT I
NEGLIGENCE

1. At all times material to this First Amended Complaint, the Plaintiff, PINELLAS COUNTY, is a political subdivision of the State of Florida.

2. At all times material to this First Amended

Complaint, the Defendant, INTERPACE CORPORATION, is a foreign corporation organized and existing under the laws of the State of Delaware and is authorized to do business in the State of Florida. On or about July 2, 1981, GHA Lock Joint, Inc. purchased certain domestic assets of the Lock Joint Products Division of the Defendant, INTERPACE CORPORATION, and contractually agreed to assume certain liabilities incurred by the Defendant, INTERPACE CORPORATION. Plaintiff is a third-party beneficiary of the contract entered into between GHA Lock Joint, Inc. and the Defendant, INTERPACE CORPORATION, or its subsidiary. On or about May 3, 1985, the Defendant, INTERPACE CORPORATION, merged with or changed its name to Clevepak Corporation, and subsequently merged with or changed its name to Madison Management Group, Inc. on or about July 9, 1987. Consequently, Clevepak Corporation and/or Madison Management Group, Inc. are successors of the Defendant, INTERPACE CORPORATION, and are liable for any and all acts alleged herein to which the Defendant, INTERPACE CORPORATION, is liable.

3. In March of 1975, the Plaintiff. PINELLAS COUNTY, executed an agreement with the consultant engineer, Black, Crow and Eidsness, Inc., whose corporate name has been changed to CH2M HILL SOUTHEAST, INC., for the design of a transmission main and selection of a route from the point of termination of the Cypress Creek transmission main which is located at the Pasco-Pinellas County line to the North Booster Station located on U.S. Highway 19 north of S.R. 580. In February of 1977, the Plaintiff, PINELLAS COUNTY, executed a contract with the Defendant, INTERPACE CORPORATION, as the pipe manufacturing contractor, for the furnishing of approximately 63,400 linear feet of prestressed concrete pipe, 60 inches in diameter, and 8,160 linear feet of prestressed concrete pipe, 54 inches in diameter, together with other fittings and specials. Both Defendants knew before entering into their obligation in relation to said transmission lines, that both the 54-inch diameter and, in particular, the 60-inch diameter transmission line, described herein, would constitute the heart of the Pinellas County Water System, and would supply water to all retail customers of the Pinellas County Water System and five wholesale customers of the Pinellas County Water System who are Pasco County and four municipalities located within Pinellas County. Said transmission lines were to be utilized and are being utilized at

the present time to receive water from the County's Cypress Creek Wellfield and the County's Cross Bar Ranch Wellfield located in Pasco County.

4. Both Defendants knew or should have known that said pipelines were to be the most critical transmission line and an integral part in the entire Pinellas County Water System which, after construction, could not be taken out of service except under extremely unusual conditions, and for short periods of time during the rainy season or the winter months. So critical is the utilization of said transmission lines that without their existence, or should their use be disrupted for any unreasonable or substantial period of time, a water emergency or water crisis would have to be declared in Pinellas County which would result in water rationing.

5. As a result of the need for said transmission lines, the Plaintiff, PINELLAS COUNTY, contracted in Pinellas County with the following named Defendants for the following indicated services for the design, creation of specifications, and manufacture of said transmission lines:

(A) With Defendant, INTERPACE CORPORATION, the pipe manufacturing contractor, a contract for the manufacture of the 60-inch diameter and 54-inch diameter transmission pipe sections which were to be installed into the transmission pipelines, said contract being executed on the 25th day of February, 1977, wherein the Defendant, INTERPACE CORPORATION, was to supply through its Lock Joints Products Division, pipeline sections for construction of the pipelines. A copy of the material portions of the contract documents is attached to this Complaint together with the appropriate bid and bidding information accepted by the Defendant, INTERPACE CORPORATION, as Plaintiff's Exhibit "A".

(B) With Defendant, CH2M HILL SOUTHEAST, INC., which was known by the name of Black, Crow and Eidsness, Inc. at the time of the execution of a contract dated the 24th day of March, 1975, between the Plaintiff, PINELLAS COUNTY, and Black, Crow and Eidsness, Inc. for Black, Crow and Eidsness, Inc. to act as the County's consulting engineers, wherein Black, Crow and Eidsness, Inc., was to provide, among other duties, route selection survey; selection of the choice of materials to be specified for the component parts of the pipeline; the investigation of above-ground and below-ground chemical, physical, soil, groundwater,

and electrical conditions and their potential effects on the materials selected for the component parts of the pipeline; to provide the final design and construction plans and specifications for the project; provide consultation and advise as to the necessity of providing or obtaining other services such as laboratory testing and inspection of samples or materials and special consultations; and to provide construction supervision such as visiting the construction site on an average of four (4) times per month to protect the owner against defects and deficiencies in the work of the contractor, to check shop drawings and descriptive data as to the general conformity to the plans and specifications of the project, and to require special examination or testing of the work and recommend final acceptance of the work. A copy of said contract is attached to this Complaint as Plaintiff's Exhibit "B".

6. Thereafter, the Defendant, INTERPACE CORPORATION, through its Lock Joint Products Division, pursuant to the plans and specifications designed and written by the Defendant, CH2M HILL SOUTHEAST, INC., as more particularly described in Plaintiff's Exhibit "A", commenced construction of the pipe sections, fittings, and other specials which, when fitted together, would constitute the 60-inch diameter and 54-inch diameter pipelines.

7. Throughout the period from approximately the 25th day of February, 1977, to the early part of 1978, the Defendant, INTERPACE CORPORATION, designed and manufactured sections of the 60-inch diameter and 54-inch diameter pipes, pipe fittings, and specials, which were delivered to the respective construction areas and installed in the ground by Bumby & Stimpson, Inc., the installation contractor. The said 60-inch diameter pipeline, when completed, consisted of approximately 12 miles of pipeline or 63,400 linear feet of pipe. The 54-inch diameter pipeline consists of approximately 1.5 miles of pipeline or 8,160 linear feet of pipe.

8. The additional importance of the 54-inch diameter pipeline is that along with a parallel 42-inch diameter main, it connects, at its northern end, to the West Coast Regional Water Supply Authority (WCRWSA) regional 66-inch diameter transmission main near the Pasco-Pinellas County line, and transports all potable water made available to Pinellas County from the Cross Bar Ranch and Cypress Creek Wellfields operated by WCRWSA in neighboring Pasco County to the north. At its northern end, the

60-inch diameter pipeline connects to the southern ends of the parallel 42-inch diameter and 54-inch diameter pipelines, the Eldridge-Wilde Wellfield transmission main, and distribution mains adjacent to, and near, the S.K. Keller Pump Station, and transports the available water south into the densely populated areas of Pinellas County. The 60-inch and 54-inch diameter pipelines thus form the major transmission conduit and lifeline for system users of potable water coming from the three major wellfields to the north. The 60-inch and 54-inch diameter pipelines are an integral part of the entire Pinellas County Water System.

9. On the 2nd day of October, 1978, the 60-inch diameter pipeline was completed and placed into service and on the 2nd day of October, 1978, the 54-inch diameter pipeline was completed and placed into service.

10. Thereafter, the Plaintiff, PINELLAS COUNTY, utilized the 60-inch diameter pipeline and the 54-inch diameter pipeline for the supply of potable water to its retail and wholesale customers of the Pinellas County Water System. On the 13th day of November, 1979, in the area of a community known as East Lake Woodlands, a section of the 60-inch diameter pipeline exploded and ruptured, causing the opening of a gigantic hole in the area of the pipeline, rendering a section of the 60-inch diameter pipeline totally unusable. As a result of the pipeline failure, the Plaintiff, PINELLAS COUNTY, embarked upon an extensive investigation to determine the cause of the pipeline failure. Thereafter, commencing on the 19th day of November, 1979, the Plaintiff, PINELLAS COUNTY, through its consulting engineers, Jones, Edmunds & Associates, Inc., conducted an extensive investigation into the design and manufacture of both the 60-inch diameter and 54-inch diameter transmission lines. A pressure test to the design working pressure of 150 pounds per square inch (psi) took place in the 60-inch diameter transmission line between Station 82+88 and Station 243+00 on the 11th day of December, 1980, resulting in a rupture of the pipeline 90 seconds after the design working pressure was attained. An examination of the resulting rupture revealed evidence of severe corrosion pitting on the wire at the rupture location and the discovery of severely corroded broken wires beneath a delamination in the outer coating. Subsequently, a detailed inspection of pipe condition, pipe design, and pipe materials was performed on pipes removed from throughout the 60-inch diameter

and 54-inch diameter transmission lines. This inspection resulted in the additional finding of sections of pipeline which were faulty in design, failed to meet specifications for the construction of the pipeline, and were the result of faulty manufacturing techniques, all of which have resulted in the determination by the Plaintiff, PINELLAS COUNTY, that both the 60-inch diameter and 54-inch diameter transmission lines are undependable and riddled with defective pipe, which will result in periodic and frequent failures of numerous and various sections of pipeline in the future to the point that said pipeline needs to be totally replaced at a cost in excess of Sixteen Million Dollars. The rupture of the 60-inch diameter pipeline on November 13, 1979 and the second rupture of the 60-inch diameter pipeline on December 11, 1980 both caused extensive other property damage to the Plaintiff, PINELLAS COUNTY, and to private landowners, in addition to causing extensive damage to the pipeline itself, as follows:

(A) Internal labor by the Plaintiff, PINELLAS COUNTY; equipment and material costs; the administrative staff required to respond to both ruptures, including personnel needed to respond initially to the rupture sites and travel to and from the scenes; professional engineering services required to ascertain needed repairs and to specify repair materials; the time of the Plaintiff's, PINELLAS COUNTY'S, Water System and purchasing personnel to order materials and to engage a contractor, to inspect the repair work, to perform chlorination, and to perform laboratory work; and the demands on the Plaintiff's, PINELLAS COUNTY'S, Water System resources to advise media, consumers, and other government agencies, and to negotiate with homeowners and landowners concerning repairs required to damaged private property proximately caused by the rupture or ruptures;

(B) Direct and indirect contract costs for labor, equipment, and materials, including the costs to acquire fill dirt to replace dirt lost through erosion; repair of damaged private landscaping; restoration of the rupture sites; repair of water damage to a nearby private residence; excavation and removal of failed pipe sections; transportation, offloading, and installation of replacement pipe; investigation of possible damage to adjacent pipes; and removal and disposal of damaged pipe;

(C) The acquisition of additional easements and rights-of-way adjacent to the pipeline to build a safety zone to pro-

tect private structures, high-use areas including roads and high-value areas including private buildings, and homes from future calamitous ruptures that will occur, within a reasonable degree of engineering probability;

(D) The loss of large amounts of water from the initial rupture and from necessary flushing, cleaning, and sanitation operations;

(E) The loss of revenues due to reduced water pressures after the 60-inch diameter pipeline ruptures and during repairs, and also intangible economic loss of revenues and property loss to the Plaintiff, PINELLAS COUNTY; and

(F) Damage to the entire water system of the Plaintiff, PINELLAS COUNTY, in that the losses and the risks incurred as a direct result of the defective transmission lines are not the types of losses and risks normally allocated to the purchaser of this type of product. The 54-inch and 60-inch diameter transmission lines are an integral part of the entire Pinellas County Water System, providing a major or sole source of water to certain areas for fire protection, sanitary services, consumption uses, hygiene uses, and other services vital to the populous of Pinellas County. The likelihood of future major personal injury and property damage is greatly increased by the Plaintiff, PINELLAS COUNTY, not receiving transmission lines built to high standards of quality for a long service life as normally anticipated in the industry, thus jeopardizing the health, safety, and welfare of the customers and residents of Pinellas County.

11. The two pipe ruptures to date have caused other property damage, as enumerated in paragraph 10, supra, in addition to consequential damages, and damages to the pipeline itself and the entire Pinellas County Water System, as the pipeline is an integral part of the entire system and is interconnected to and is interdependent with the entire system. The Defendant, INTERPACE CORPORATION, agreed that its product would meet the Plaintiff's, PINELLAS COUNTY'S, reasonable economic expectations, and although the Plaintiff, PINELLAS COUNTY, relied on the Defendant's, INTERPACE CORPORATION'S, skill and judgment to select and to furnish a suitable product consisting of suitable materials, the Defendant, INTERPACE CORPORATION, did not exercise reasonable care in the design and manufacture of the pipe components, resulting not only in damage to the product itself

but also other damage to property. The failure by the Defendant, INTERPACE CORPORATION, to exercise reasonable care in the design and manufacture of the pipe components resulted in the creation of a continuing and worsening condition that is unreasonably dangerous to both persons and property and that will, within a reasonable degree of engineering probability, cause future damage to the pipeline and therefore to the entire Pinellas County Water System, in addition to future other property damage to the Plaintiff, PINELLAS COUNTY, and potential future damage to the property of private citizens and personal injury to private citizens and to county personnel, as the pipeline is located adjacent to homes, buildings, and roads in congested Pinellas County, for which the Plaintiff, PINELLAS COUNTY, will be responsible.

Furthermore, the Defendant, INTERPACE CORPORATION, breached the standards of the pipe manufacturing industry and the standards of general custom and usage in the pipe manufacturing industry by its negligent design, manufacture, and marketing of a defective product which is unreasonably dangerous and riddled with latent defects, thereby creating an unreasonable, dangerous condition.

The unreasonably dangerous condition created by the Defendant, INTERPACE CORPORATION, was the proximate cause of two sudden, dangerous, and calamitous pipe ruptures, and the existing unreasonable, dangerous condition will be the proximate cause, within a reasonable degree of engineering probability, of future damage to the pipeline itself, the entire water system, and to other property.

The deteriorating condition of the pipeline components will, within a reasonable degree of engineering probability, result in more future, sudden, dangerous, and calamitous pipe ruptures, which will proximately cause future damages to the pipeline, the water system, and to other property.

The risk of damages to the pipeline and to other property as a result of the knowing creation of an unreasonably dangerous condition by the Defendant, INTERPACE CORPORATION, was reasonably foreseeable to the Defendant, INTERPACE CORPORATION, was hidden to the Plaintiff, PINELLAS COUNTY, and cannot be considered to be a part of any ordinary contractual risk.

12. The Defendant, INTERPACE CORPORATION, carelessly and negligently designed, manufactured, and produced the

60-inch diameter and the 54-inch diameter pipes, pipe fittings, and specials, and negligently and carelessly fell below the standards commensurate in the industry for the design and manufacture of pipes, pipe fittings, and specials in the following respects:

(A) The material parameters used in the design of the pipes were different from and superior to the characteristics of the materials used to fabricate the pipe or, in other words, the materials utilized in the manufacture of the pipe did not meet the design assumptions in that:

(1) The modules of elasticity of the concrete at the time the pipes were prestressed was less than that assumed to compute the initial modular ratio submitted by the contractor (INTERPACE CORPORATION) to the engineer (Black, Crow and Eidsness, Inc.), approved by the engineer, and used in the design;

(2) The resultant modulus of elasticity of the concrete assumed to compute the resultant modular ratio submitted by the contractor (INTERPACE CORPORATION) to the engineer (Black, Crow and Eidsness, Inc.), approved by the engineer, and used in the design to calculate the losses in concrete prestress, was higher than the resultant modulus of elasticity of the concrete used in the fabrication of the pipe;

(3) The combined modulus of elasticity of the steel cylinder and prestressed wires assumed to compute the initial and resultant modular ratios submitted by the contractor (INTERPACE CORPORATION) to the engineer (Black, Crow and Eidsness, Inc.), approved by the engineer, and used in the fabrication of the pipe was higher than the combined modulus assumed in the design;

(4) The creep of the concrete used in the fabrication of the pipe exceeded the concrete creep assumed in the design of the pipe;

(5) The three-edge bearing strength of the pipe did not consistently meet the minimum value assumed in the design calculations;

(6) The creep factor assumed in design was insufficient to compensate properly for actual material properties and/or for the variations in factors affecting the actual behavior of the pipe;

(7) The wire embedment and/or relax-

ation losses assumed in design were insufficient to compensate properly for actual material properties and/or for the variations in factors affecting the actual behavior of the pipe;

(8) The steel cylinder thickness assumed in the design calculations was less than the value specified and less than the cylinder thickness actually provided, resulting in less prestressing wire being applied to the concrete than necessary to resist the internal pressure; and

(9) The material components of the pipe were chosen, assembled and manufactured so as to result in a final product that failed to meet the pressure at zero core concrete stress, P_0, to achieve the design required by project specifications, and represented as being provided by the Defendant, INTERPACE CORPORATION.

As a direct and proximate result of the use of the incorrect parameters in the design, the Defendant, INTERPACE CORPORATION, provided to the Plaintiff, PINELLAS COUNTY, pipe which was lower in strength; which failed to meet the specified design working pressure of 150 psi and specified design plus surge (water hammer) pressure of 210 psi; and which had less safety factor than represented by the manufacturer, INTERPACE CORPORATION, and required by the specifications for the manufacture of the pipe as specified in Plaintiff's Exhibit "A".

(B) The concrete materials used in the fabrication of the pipe did not meet the specification requirements as contained in Plaintiff's Exhibit "A" in that:

(1) The fine aggregate incorporated in the concrete core and the mortar coating over the prestressed wires was more finely graded than permitted by the specification limits (AWWA C-301-72);

(2) The coarse aggregate incorporated in the concrete contained deleterious substances in the form of minus 200 (-200) mesh sieve material, soft particles, clay lumps, and the combination thereof in excess of the amounts permitted by the specifications limits (AWWA C-301-72);

(3) Chemical admixtures were used in the concrete without the permission or knowledge of the purchaser, Plaintiff, PINELLAS COUNTY, as required by the specifications. The type of admixture and quantity used was changed without notifying the purchaser, Plaintiff, PINELLAS COUNTY;

(4) The mortar coating did not consistently meet the specification requirement (AWWA C-301-72) that the mortar coating consist of one part cement to three parts fine aggregate;

(5) Mortar was used as the coating material for the subject pipe instead of the specified required concrete coating;

(6) The Defendant, INTERPACE CORPORATION, failed to submit to the Defendant, CH2M HILL SOUTHEAST, INC., the consulting engineers, its test results on materials and the affidavit and certification of compliance with all applicable provisions of the standard as required in AWWA C-301-72, and certifications as required in their contract with the Plaintiff, PINELLAS COUNTY; and

(7) The Defendant, INTERPACE CORPORATION, failed to utilize a mortar mix of sufficient richness to permit a high moisture content for coating placement, and to thereby provide a coating of sufficient quality to protect the prestress wire adequately.

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, through the use of nonconforming materials, the concrete used in the fabrication of the pipe did not possess the qualities deemed essential and required by the specifications to ensure adequate performance and durability of the pipe. The use of the admixtures to attempt to compensate for the deficiencies of the materials and procedures used was hidden from the purchaser, Plaintiff, PINELLAS COUNTY, contrary to the requirements of the contract between the Plaintiff, PINELLAS COUNTY, and the Defendant, INTERPACE CORPORATION.

(C) The prestress wire used in the fabrication of the pipe did not meet the specification requirements as contained in Plaintiff's Exhibit "A" or the recognized standards commensurate in the wire drawing industry in that:

(1) The prestress wire consistently failed to meet the specified minimum permissible diameter of 0.1600 inch;

(2) Prestress wire with split seams and serious seams was used in violation of specification requirements (ASTM A-227). Also, wire which was known to be prone to splitting and wire with longitudinal splits was used;

(3) The wire was overdrawn and grossly defective in that it was susceptible to splitting, environmentally assisted crack growth (stress corrosion and hydrogen embrittlement), and pitting, resulting in failure in the environment in which it was known or should have been known that it was going to be exposed and placed into service;

(4) The temperature of the lead quench portion of the patenting furnace was improperly lowered below the minimum acceptable temperature for production of satisfactory patenting rod to increase rod strength and increase the strength of the wire drawn therefrom;

(5) The temperature of the wire was not properly controlled during the wire drawing process and the wire was not cold drawn as required by the project specifications and the applicable national standards, thereby allowing the wire's temperature to rise beyond the maximum allowable temperature for production of satisfactory quality wire, and thereby creating wire that lacked sufficient ductility for its intended purpose;

(6) The rod used to make the prestress wire was of the incorrect dimension and inappropriate quality;

(7) The cleaning and coating of the patented rod, prior to wire drawing, was improper and inadequate, resulting in increased wire drawing temperature, and consequent hydrogen charging and embrittlement of the wire;

(8) The Defendant, INTERPACE CORPORATION, failed to discard rod which had been subjected to stoppage and improper speeds in the lead patenting line, resulting in the use of improperly and defectively patented rod in the manufacture of the wire;

(9) "Class IV", 8-gauge prestressing wire, used throughout the pipe, was wire with a strength and quality not recognized or recommended by any national standards, organization, or published specification. This prestress wire was manufactured and used solely to obtain a cost advantage over competitors;

(10) The development of "Class IV" wire was not done by, or under the supervision of, personnel competent in the field of wire manufacturing or wire metallurgy;

(11) The wire was inadequately tested during its development and manufacture by the Defendant, INTERPACE CORPORATION, by their failure to apply all of the

appropriate tests, including the torsion test, thoroughly and completely; by their failure to explore the properties and performance of the wire fully; by their failure to properly account for all of the stresses in the installed wire which result in excessive relaxation, relative to the design assumptions, resulting in inadequate prestressing of the wire on the pipe; and by their failure to interpret the nature of the results correctly and prudently of the few inadequate tests that were performed;

(12) The equipment used in the wire drawing process was not properly maintained, calibrated, or prepared for use;

(13) The "Class IV" wire was improperly manufactured and drawn in that the Defendant, INTERPACE CORPORATION, used improper wire drawing equipment which had either a 5 or, at best, a 6 drawing die capability, whereas it is metallurgically impossible to make proper "Class IV", 8-gauge wire, especially with 5 or 6 die drawing practice;

(14) During manufacture of the "Class IV" wire and prior to its being sent to the manufacturing plant to be wrapped on the pipe sold to the Plaintiff, PINELLAS COUNTY, the Defendant, INTERPACE, CORPORATION, failed to stress relieve the "Class IV" wire which it manufactured, in order to make it less susceptible to corrosion. By the Defendant's, INTERPACE CORPORATION'S, failure to stress relieve the "Class IV" wire prior to placing it on the pipe sold to the Plaintiff, PINELLAS COUNTY, the Defendant, INTERPACE CORPORATION, made the wire much more susceptible to corrosion and thus ultimate failure by failing to utilize the stress relieving process;

(15) The Defendant, INTERPACE CORPORATION, failed to produce wire of proper ductility in that the wire developed serious seams both during and following manufacture. Therefore, non-ductile wire was placed upon the pipe sold to the Plaintiff, PINELLAS COUNTY. The Defendant, INTERPACE CORPORATION, further failed to perform any torsion test in the development and manufacturing stages of production of the wire, which if performed would have shown that the wire did not pass the torsion test and therefore was not ductile and should not have been used in the manufacture of prestressed concrete pipe sold to the Plaintiff, PINELLAS COUNTY;

(16) During the manufacture of the pipe

sold to the Plaintiff, PINELLAS COUNTY, the Defendant, INTERPACE CORPORATION, wrapped the prestress wire at stress levels above the elastic limit of the wire. Due to the extremely high and deleterious wire temperatures permitted during wire manufacturing, this caused the wire to go into relaxation more than calculated in design, and thereby lowered the P_O of the pipe, thus producing pipe with lower working pressure and surge pressure than calculated in design;

(17) The Defendant, INTERPACE CORPORATION, manufactured and produced "Class IV" wire which was placed on pipe sold to the Plaintiff, PINELLAS COUNTY, and which had the characteristic of tending to produce "star fractures" with longitudinal splitting in the fracture surface. This type of fracture is recognized in the wire-making industry as an indication of defective and brittle wire. Therefore, the Defendant, INTERPACE CORPORATION, failed to place properly manufactured wire on the pipe sold to the Plaintiff, PINELLAS COUNTY, and, instead, furnished wire containing longitudinal seams and planes of weakness which, when subjected to environmental conditions not sufficiently severe to cause pitting, nonetheless produced stress corrosion cracking and hydrogen embrittlement in the defective wire furnished by the Defendant, INTERPACE CORPORATION;

(18) The fact that the Defendant, INTERPACE CORPORATION, produced defective "Class IV" wire in each and every pipe sold to the Plaintiff, PINELLAS COUNTY, and that such defects require a total replacement of the pipeline sold to the Plaintiff, PINELLAS COUNTY, by the Defendant, INTERPACE CORPORATION, is demonstrated by the fact that there have been numerous pipe failures in pipe containing defective "Class IV" wire and other manufacturing defects as alleged in this Amended Complaint. These pipe failures throughout the country on other pipe sold to other customers by the Defendant, INTERPACE CORPORATION, demonstrate that "Class IV" wire constitutes an inherent latent defect and prove, with a reasonable degree of engineering probability, that the pipeline sold to the Plaintiff, PINELLAS COUNTY, will prematurely fail;

(19) The Defendant, INTERPACE CORPORATION, failed to provide wire test specimens and other steel test specimens to the Defendant, CH2M HILL SOUTHEAST, INC., as required by the contract specifications contained in Plaintiff's

Exhibit "A" and by Section 1.9 of AWWA C-301-72, the applicable national standard;

(20) The Defendant, INTERPACE CORPORATION, failed in general to meet the requirements of Section 1.8 of AWWA C-301-72, requiring the manufacturer to perform all work in a thorough, workmanlike manner, using mechanics skilled in their various trades as evidenced, among many examples, by corroded wire, over-heated wire, wire that failed the torsion test, wire that is extremely sensitive to hydrogen embrittlement and stress corrosion cracking, split wire, brittle wire, wire with seams, rusty wire, and non-ductile wire; and

(21) Before commencing commercial production of prestressed concrete embedded cylinder pipe incorporating "Class IV" wire, the Defendant, INTERPACE CORPORATION, failed to investigate sufficiently and conduct adequate preliminary testing on "Class IV" wire, and pipes incorporating "Class IV" wire. Furthermore, the Defendant, INTERPACE CORPORATION, withheld information developed by the Defendant, INTERPACE CORPORATION, which indicated inferior performance of pipe manufactured using "Class IV" wire in lieu of acceptable wire manufactured pursuant to published material standards.

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, the subject pipeline's prestress wire is so defective, and its safety factor against failure is so continuously being reduced, that the pipeline is unreliable, will continue to fail prematurely in service, and constitutes a hazard to the community and surrounding areas and to the health, safety, and welfare of community residents where it is located.

(D) The procedures used to manufacture the pipe were not in accordance with the requirements of the specifications contained in Plaintiff's Exhibit "A" in that:

(1) Pipe cores were not cured as required by the specifications (AWWA C-301-72). Cores were "tipped" from their bases and removed to a storage yard prior to 32 hours age. Water spraying was haphazard and only portions of the cores were kept moist for the required curing period;

(2) Water curing of the mortar coating was not maintained for four (4) days as required by the specifications (AWWA C-301-72). Pipes were prematurely removed from

curing and stored in open yard subject to drying and shrinkage;

(3) The minimum clear distanc between prestress wires was not maintained at all times, resulting in adjacent wires touching, thereby creating voids which could not be filled with protective slurry or mortar;

(4) Defective concrete and mortar were not removed to the extent necessary to ensure the quality of the pipe;

(5) Repairs were made to the pipe using materials having different constituents, consistencies, and qualities from those required by the specifications contained in Plaintiff's Exhibit "A";

(6) Work was not performed in a workmanlike manner by properly trained employees and mechanics skilled in their trade;

(7) The precast concrete cores consistently failed to meet the specified minimum core thickness;

(8) The coating consistently failed to meet the specified 7/8-inch minimum coating thickness;

(9) Pipe was improperly handled during manufacture by allowing unwrapped or wrapped pipe to be contaminated with mud, soil, or clay, resulting in inclusions of mud, soil, or clay between the wires and beneath the coating;

(10) Wire splices found on individual pipes were of such frequency that some of the pipes had to have been produced with four or more separate sections of wire, providing clear evidence as to the poor quality of the wire at the time of wire wrapping;

(11) Pipe coating was not properly deposited and consolidated to produce a dense, durable wire encasement as required by the specifications (AWWA C-301-72). Failure to consolidate the coating properly and sufficiently created a non-uniform coating with a zone of high porosity and low cement paste content at the prestress wire level and beneath wire haunches, thereby failing to protect the wire adequately from corrosion;

(12) Inadequate welding practices were used in welding of the steel cylinders, resulting in the probability of cylinder leakage, and corrosion and embrittlement of the prestress wire; and

(13) Total or partial lack of quality control existed at the plant, so that important phases of the pipe's manufacture were uncontrolled and inadequate, resulting in the manufacture of substandard pipe which will ultimately and prematurely fail in service.

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, and because of the deficiencies hereinabove alleged, the concrete pipe produced were of variable and uncertain quality resulting in imperfections and weak areas in unknown locations, subject to environmentally induced wire corrosion and embrittlement, excessive stresses, reduced safety factors, reduced durability, and premature pipe failure.

(E) The equipment used to fabricate the pipe was not properly maintained, calibrated, or prepared for use. In addition, the Defendant, INTERPACE CORPORATION, was careless and negligent in that:

(1) Welding rods used to fabricate the steel cylinders were not maintained in adequately heated dry storage as recommended by the rod manufacturer to ensure satisfactory welds;

(2) Molds were not thoroughly cleaned before each use as required by the specifications (AWWA C-301-72) resulting in imperfect concrete surfaces with numerous voids;

(3) Molds were not properly assembled and sealed which produced cores that have irregularities and offsets in the surface at the mold gates, variable wall thickness, thin on one side, and eccentrically positioned cylinders within the core, resulting in stresses within the pipe greater than those for which it was designed; and

(4) Application of the cement slurry prior to coating the prestress wire was erratic and insufficient, resulting in areas throughout the pipeline which are highly susceptible to corrosion of the prestress wire. Specifically, the slurry was of improper consistency. Also, the slurry application was erratic or non-existent, and was insufficient beneath the wire haunches, in the area where the wire contacts the precast concrete core, and on the remaining wire surface areas. This deficient application of slurry has subsequently failed to provide a protective environment for the wire, resulting in rapid corrosion, including embrittlement, of

the prestressed wire and premature ultimate failure.

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, and as a consequence of the above-described deficiencies, the pipeline was supplied with less strength, capacity, and durability than required by the specifications as contained in Plaintiff's Exhibit "A".

(F) The quality control exercised during production of the pipe was inadequate to ensure pipes were produced in accordance with the specification requirements. As a result of these actions, the Defendant, INTERPACE CORPORATION, was careless and negligent in the following additional respects:

(1) The personnel conducting the quality control tests required by the specifications were not qualified or adequately trained;

(2) The quality control tests performed were not made in accordance with the ASTM methods cited in the specifications as required by Plaintiff's Exhibit "A";

(3) Inadequate personnel were employed to assure product conformance with the specifications in all respects;

(4) The quality control program used was inadequate to ensure that pipes conforming to the specifications or that pipes undamaged during the manufacturing process were supplied;

(5) The pipe was manufactured and cured using materials and practices which resulted in carbonation of precast core concrete paste at and beneath the surface upon which the prestress wire was subsequently wrapped, thereby lowering the pH and eliminating the protection of the wire provided by high alkalinity, resulting in corrosion of the prestress wire and ultimate failure;

(6) The pipe was manufactured with coating material containing debris, stones, chunks of hardened concrete, and pockets and lenses of sand unmixed with cement, resulting in inadequate protection of the wire from corrosion;

(7) Prestress wire and coating were applied to precast concrete surfaces contaminated with dirt, oil, and mud, and which concrete surfaces contained numerous unfilled voids, resulting in poor bond of the coating to the core and

inadequate protection of the wire from corrosion;

(8) The pipe was manufactured with mortar coating of varying and uncontrolled consistency and moisture content, and was mishandled during manufacturing, resulting in non-uniform coating with zones of high porosity, delaminated coating, cracked coating, coating containing holes and voids, coating prone to excessive shrinkage and shrinkage cracking, and coating with inconsistent and poor bonding properties;

(9) The pipe was manufactured with steel cylinders which were not uniformly round or concentrically positioned, as required by the project specifications, resulting in variable and unknown core concrete stress distributions and the inability to install pipe tapping assemblies dependably;

(10) The pipe was manufactured with prestress wire which was improperly stored, poorly protected from the weather, and, as a result, corroded at the time of pipe manufacture; and

(11) The Defendant, INTERPACE CORPORATION, failed to inspect the pipe properly prior to shipping to guard against coating drumminess and separation of the coating from the joint rings or the core;

As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove described, the above-described deficiencies resulted in the delivery of a pipeline which did not conform to the specification requirements and had imperfections making it susceptible to deterioration and corrosion of the prestressed wires leading ultimately to failure.

(G) The field repairs conducted by the Defendant, INTERPACE CORPORATION, of damaged pipe were made under the supervision of the manufacturer's representative and were not adequate to prevent corrosion of the prestress wire.

(H) Accelerated corrosion tests were done on "Class IV", 8-gauge prestress wire, the results of which indicated poor performance of such wire relative to the other classes of wire in the categories of stress corrosion cracking and pitting corrosion. These significant results and information were withheld by the Defendant, INTERPACE CORPORATION, from consulting engineers and customers.

(I) Tests on the coating of experimental pipe

manufactured with "Class IV" prestress wire were done, the results of which indicated poor coating cracking performance. These significant test results and information were withheld by the Defendant, INTERPACE CORPORATION, from consulting engineers and customers.

(J) The Defendant, INTERPACE CORPORATION, failed to protect properly the prestress wire incorporated into the subject pipe in that:

(1) Said wire was placed upon carbonated precast concrete cores. Carbonated concrete cores create an environment under the prestress wire which fails to provide uniform and sufficient alkalinity to protect the wire, thus violating one of the fundamental assumptions of prestressed concrete pipe development, and thereby resulting in corrosion of the corrosion-susceptible "Class IV", 8-gauge prestress wire and ultimate failure;

(2) The Defendant, INTERPACE CORPORATION, placed rusty, corroded, or corrosion-pitted wire on the pipe, thereby creating a concealed condition in manufacture, wherein the wire corrosion process was already initiated at the time of pipe manufacture, thereby making the entire pipeline much more susceptible to failure;

(3) The Defendant, INTERPACE CORPORATION, failed to require a slurry coating on the wire just before wrapping the pipe to eliminate wire corrosion at the interface of the wire and the precast concrete core; and

(4) Furthermore, application of the cement slurry following prestressing was erratic, insufficient or nonexistent, and of improper consistency beneath the wire haunches in the area where the wire contacts the precast concrete core, and on the remaining wire surfaces.

As a consequence, the prestress wire has undergone continued rapid corrosion, including embrittlement, resulting in premature, ultimate failure.

(K) The Defendant, INTERPACE CORPORATION, had written intercompany procedures, known as Manufacturing Procedures (MP's), Testing Procedures (TP's), Material Specifications (MSP's), and Operations Circulars (OC's), which set forth the company's own standards to be met and followed during the manufacturing and testing of the pipe. In addition, a manual of quality control procedures was published for use

within the company setting forth what were known to be, based upon experience and prudent engineering, minimum standards to be followed to ensure a quality product. These intercompany procedures and manuals reflect, in part, some evidence of the standard of care to which a reasonable manufacturer of prestressed concrete pipe should be held. These manuals were not consistently followed nor adhered to, resulting in an inferior, defective pipe of a quality and durability substantially less than could have been the case had these manuals been followed, and substantially less than the Plaintiff, PINELLAS COUNTY, had bargained for in retaining a nationally known prestressed concrete pipe manufacturer.

(L) The Defendant, INTERPACE CORPORATION, failed in general to make pipe according to the specifications in Plaintiff's Exhibit "A", including AWWA C-301-72.

13. Properly manufactured pipe which was to be delivered by the Defendant, INTERPACE CORPORATION, to the Plaintiff, PINELLAS COUNTY, was advertised or represented by the Defendant, INTERPACE CORPORATION, to last for 100 years and, in fact, if properly designed and manufactured, should or would last indefinitely. The pipe, and as a result the pipelines, namely the 60-inch diameter and 54-inch diameter transmission lines, designed and manufactured by the Defendant, INTERPACE CORPORATION, are inherently defective with defects as hereinabove alleged which were latent and undiscoverable by the Plaintiff, PINELLAS COUNTY, unless the pipe itself was inspected through destruction of the pipe thus rendering it useless for service in the pipeline. As a result of the construction, design, and manufacture of the above-described latent defects, the Plaintiff, PINELLAS COUNTY, was unaware of the existence of said latent defects until, through its lengthy and scientific investigation, the determination and existence of said latent defects in its transmission lines became known to the Plaintiff, PINELLAS COUNTY the 3rd day of September, 1980, when at said time, the Plaintiff, PINELLAS COUNTY, placed the Defendant, INTERPACE CORPORATION, on notice of its responsibilities for furnishing the Plaintiff defective pipelines. Said latent defects were not discoverable through reasonable diligence of the Plaintiff, PINELLAS COUNTY, until said date because said latent defects could only be discoverable by destruction of the pipe itself. The fact that other INTERPACE CORPORATION pipeline failures occurred throughout the country

involving INTERPACE CORPORATION pipes with "Class IV", 8-gauge wire put INTERPACE CORPORATION on notice of a severe problem with "Class IV", 8-gauge wire, and other problems with pipe material components and design defects, before the manufacture of the Plaintiff's, PINELLAS COUNTY'S, pipeline. Nevertheless, the Defendant, INTERPACE CORPORATION, manufactured the Plaintiff's, PINELLAS COUNTY'S, pipeline using defective material that created dangerous latent defects in the pipeline.

The fact that other failures of the Defendant's, INTERPACE CORPORATION'S, pipelines have continued, and are continuing, throughout the country indicates that the Defendant, INTERPACE CORPORATION, created a dangerous latent condition in the manufacture of the Plaintiff's, PINELLAS COUNTY'S, pipeline.

As hereinabove alleged, the pipeline is an indispensable main artery and an integral part of the entire Pinellas County Water System and cannot be taken out of service for any substantial length of time. Consequently, the Plaintiff, PINELLAS COUNTY, can only periodically examine sections of the pipeline during periods of low demand when service may be temporarily interrupted through said pipelines.

14. As a direct and proximate result of the carelessness and negligence of the Defendant, INTERPACE CORPORATION, as hereinabove alleged, the Plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars in that the Plaintiff, PINELLAS COUNTY, has had to repair damage to the pipeline itself and other resulting property damage from the two calamitous ruptures to date; will be required to repair all potential future damages to the pipeline and to other property resulting from the unreasonably dangerous condition created by the Defendant, INTERPACE CORPORATION; will be required to replace the entire 60-inch diameter and the 54-inch diameter transmission lines; will be required in the replacement of said lines to design, acquire, and provide to its water system all materials needed for the construction of said pipelines, which includes but is not limited to surveying and engineering services; testing; supervision, inspection of manufacturing, construction, and inspection of construction; acquiring materials, including new pipe, fittings, specials, valves, and appurtenances; the acquisition of new easements and rights-of ways; the acquisition of temporary construction ease-

ments; the removal, disposal, and backfilling of the existing defective pipeline; road and utility repair; reimbursement of costs to other utilities; work tasks performed by Pinellas County personnel and equipment; administration; and all associated labor, materials, equipment, and costs. In addition thereto, the Plaintiff, PINELLAS COUNTY, has been damaged in that it has been required to incur expenses in costs of inspection and testing of its pipeline to determine the existence of the defects and has been required to hire the services of consulting engineers for said purposes together with other experts, all of which damages exceed the sum of Sixteen Million Dollars.

...

COUNT IX
NEGLIGENCE AGAINST CH2M HILL SOUTHEAST, INC.

Plaintiff, PINELLAS COUNTY, by its undersigned attorney, sues the Defendant, CH2M HILL SOUTHEAST, INC., and avers:

63. Plaintiff, PINELLAS COUNTY, realleges and reavers its allegations contained in Paragraphs 1 through 14, Count I, above.

64. At all times material to this Complaint, Defendant, CH2M HILL SOUTHEAST, INC., is a Florida corporation formerly known as Black, Crow and Eidsness, Inc., who changed its corporate name to CH2M HILL SOUTHEAST, INC. and who is an engineering company organized and existing under the laws of the State of Florida, and is engaged in the engineering profession.

65. The Defendant, CH2M HILL SOUTHEAST, INC., in consideration of the payment of $292,211.16, which was 4.5 percent (%) of the total estimated construction costs of the project, provided final design plans and specifications pursuant to and under the terms of the contract between the Plaintiff, PINELLAS COUNTY, and Defendant, CH2M HILL SOUTHEAST, INC., Plaintiff's Exhibit "B". In addition, the Defendant provided construction supervision for an additional compensation of $72,728.11 which represents 1.12 percent (%) of the estimated construction costs.

66. The Defendant, CH2M HILL SOUTHEAST, INC., carelessly and negligently performed its duties owed to the Plaintiff, PINELLAS COUNTY, under their contract, Plaintiff's

Exhibit "B", in the following manner:

(A) Failed to direct properly, to perform, or to have performed soil survey investigations including, but not limited to, soil resistance to the flow of electric current, total soil acidity, soil drainage (groundwater fluctuation), soil texture, soil microbial activity, and soil chemistry; and failed to direct properly, to perform, or to have performed a corrosion testing program to determine the effects of the aforementioned local soil corrosion conditions on the rate of corrosion of prestressed steel wire embedded in mortar. As a direct result of such failure, the pipeline has been exposed to detrimental soil and groundwater conditions resulting in, but not limited to, a deterioration of and damage to the pipe mortar coating and the prestressed wire;

(B) Failed to direct properly, to perform, or to have performed investigations of the pipeline route for stray electrical currents, low soil resistitivities, and aggressive soil and groundwater conditions; failed to design the pipeline to prevent damage by electrolytic currents and stray electrical currents; and failed to consider in the design of the pipeline the effect of overhead voltage lines or any other sources of stray electrical currents on the structural integrity of the prestressed wires and, consequently, the entire pipeline. As a result, electrolytic currents and stray electrical currents have produced damages in, but not limited to, pipeline prestressed wires;

(C) Failed to prepare and review specifications properly for pipe manufacture by approving pipe manufactured with "Class IV" wire when, in fact, there were no recognized specifications which existed providing for such wire; by allowing specifications that did not require the wire to be ductile; by approving pipe designed with inadequate safety factors; by failing to review design calculations for the individual sections of pipe; by allowing the Defendant, INTERPACE CORPORATION, to specify ASTM A-648-73, which is not recognized nor sanctioned in AWWA C-301-72, and furthermore, the provided "Class IV" wire is not recognized nor sanctioned by ASTM A-648-73; by approving the use of 17-gauge cylinder steel instead of the specified 16-gauge cylinder steel; and by specifying only the absolute minimum standards and specifications, thereby permitting defective pipe to be made. Furthermore, the Defendant, CH2M HILL SOUTHEAST, INC., agreed to review all project documents submitted to the Plaintiff,

PINELLAS COUNTY, from the Defendant, INTERPACE CORPORATION, but subsequently failed to review such documents;

(D) Failed to specify, to perform, or to have performed, sufficient inspection and testing of materials used in the manufacture of the pipe to ensure the pipe would be manufactured and delivered as required by the specifications; failed to inquire of the Defendant, INTERPACE CORPORATION, of the use of admixtures that were used in the manufacture of the pipe, and by having no knowledge of the use of admixtures failed to approve, or to inspect the use of, admixtures; failed to require the Defendant, INTERPACE CORPORATION, to perform any additional tests not specifically mentioned in the standards and specifications, but necessary to ensure the quality and safety of the manufactured pipe; and failed to require that test results of the pipe manufacturing contractor and affidavits or certifications of compliance by the pipe manufacturing contractor be supplied for review as directed in the INTERPACE CORPORATION contract and AWWA specifications. As a result, materials were used in the manufacture of the pipe, and manufactured pipe was provided, which did not meet specification requirements;

(E) Certified completion of the project to the Plaintiff, PINELLAS COUNTY, without receiving affidavits and certifications of compliance. As a result of this negligence, the Plaintiff, PINELLAS COUNTY, was misled into believing that the pipeline was manufactured using materials and practices which complied in all respects with the standards and specifications;

(F) Failed to specify, to direct, to perform, or to have performed, adequate quality control tests on the manufactured pipe, which negligence included, but is not limited to, failure to detect that the pipe was being manufactured with materials which did not meet the design assumptions or the project specifications; failure to detect that the pipe was being manufactured with wire which contained serious seams and which was grossly susceptible to pitting, hydrogen embrittlement, and stress corrosion cracking as a result of defects formed during manufacture, that molds or forms were not correctly aligned during concrete pouring operations resulting in the cores of the pipes not meeting specified thicknesses, thereby causing stresses within the pipe greater than those for which it was designed, and failure to detect that the coating did not, in all cases, meet specified minimum thickness and composi-

tion requirements; failure to detect improper consolidation and non-uniformity of the coating; failure to detect that the mortar coating was being damaged and was separating during the manufacturing operation; failure to detect inadequate curing; failure to detect contamination of coating materials and precast cores; failure to detect defective coating patches; failure to detect insufficient core thicknesses and out-of-round steel cylinders; failure to detect improper cylinder welding procedures; failure to detect improperly stored corroded wire; failure to detect delaminated coating; failure to detect carbonation of the concrete cores, failure to detect non-uniform slurry application; and failure to detect that application of the cement slurry prior to the coating of the prestress wire was erratic, resulting in areas of unknown location throughout the pipeline which are highly susceptible to corrosion of the prestress wires and which have reduced safety factors, reduced durability, and which will ultimately lead to premature failure of the pipeline;

(G) Failed to provide proper inspection of the subject pipe during its production at the manufacturer's plant in Lacoochee and failed to detect the generally inadequate and negligent quality control situation at the pipe manufacturing plant. Furthermore, the Defendant, CH2M HILL SOUTHEAST, INC., failed to advise the Plaintiff, PINELLAS COUNTY, of the need for part-time or full-time in-plant inspections during the time the pipe was manufactured, and further failed to advise the Plaintiff, PINELLAS COUNTY, of the need to provide funds for these in-plant inspections;

(H) Failed to specify acceptance inspection procedures adequate to identify defective pipe. In addition thereto, the Defendant, CH2M HILL SOUTHEAST, INC., failed to inspect the work properly; failed to identify incorrect pipe loading and unloading techniques; failed to require the Defendant, INTERPACE CORPORATION, to provide samples and specimens of pipe manufacturing materials as provided for in the standards and specifications; failed to examine and test said material samples and specimens; and failed to require the Defendant, INTERPACE CORPORATION, to provide an affidavit and certification of compliance at the end of the project;

(I) Failed to require proper repairs to pipe damaged during transportation or installation;

(J) Failed to investigate "Class IV", 8-gauge wire

sufficiently before approving of such wire to be used in the manufacture of the subject pipeline; failed to review available test data for "Class IV", 8-gauge wire or to contact competent wire manufacturers; and failed in permitting the use of "Class IV", 8-gauge wire, failed to require said wire to undergo adequate testing, including torsion testing, hydrogen embrittlement testing, and stress corrosion cracking testing, before acceptance;

(K) Failed to detect that the pipe coating material was mortar rather than concrete as required in the specification;

(L) Failed in their design of the system to provide for sufficient flexibility which would allow the Plaintiff, PINELLAS COUNTY, to operate the subject pipeline in the future at working pressures up to 150 psi which may be needed for future water system operation;

(M) Failed to design the system to include a sufficient surge pressure margin or surge protection facilities adequate for the surges to which the pipeline is being, and will be, subjected during its operation;

(N) Failed to design the surge protection facilities properly which were provided. Specifically, of those air and vacuum valve assemblies which were specified and installed, the design was such that, when installed, many of the assemblies were flooded by groundwater and surface water. This rendered them unsuitable for the use intended, of mitigating surges and protecting the pipeline against water hammer damage. Furthermore, this endangered the health and safety of the Plaintiff's customers by exposing them to the probability that polluted water would be drawn into the potable water system and supplied to the Plaintiff's customers. As an additional result, the Plaintiff, PINELLAS COUNTY, suffered the added expense and inconvenience of redesigning and reinstalling said air and vacuum valves above ground so as not to be affected by the groundwater table and surface runoff waters;

(O) Failed to take into consideration and to design to prevent the probability that surges would be induced in the pipeline due to the operation and interaction between the Cypress Creek Pump Station, S.K. Keller Pump Station, and North Booster Station; all three stations, plus the interconnecting piping, having been designed by the Defendant, CH2M HILL SOUTHEAST, INC., prior to the design of the pipeline; failed to forewarn the Plaintiff, PINELLAS COUNTY, that the operation, or modifica-

tion to operation, of pumps; motors, drives, valves, actuators, and other appurtenances in the above-mentioned pump stations, when acting individually or together, could result in damaging surges being introduced into the pipeline; and failed to design, recommend, or advise as to the need for instrumentation to monitor for surges which could damage said pipeline, and which could be produced by the operation or interaction between these three pump stations;

(P) Failed in drafting the PINELLAS COUNTY/INTERPACE CORPORATION contract, which was ultimately signed, to require the Defendant, INTERPACE CORPORATION, to provide all test results as required to be performed under AWWA C-301-72; failed to require an affidavit and certification of compliance as provided for in AWWA C-301-72; failed to provide provisions in the contract that would give a sufficient warranty period by specifying only a one-year warranty period; and failed to provide a proper protection clause and recourse against the Defendant, INTERPACE CORPORATION, in the event that a defective product was supplied;

(Q) Failed to inform the Plaintiff, PINELLAS COUNTY, of its knowledge and understanding that the pipeline would only be expected to last approximately fifty years, while the Defendant, INTERPACE CORPORATION, consistently maintained the pipeline would last either indefinitely or at least one hundred (100) years;

(R) Failed to exercise due care in reviewing submittals from the Defendant, INTERPACE CORPORATION, which submittals described the prestressed concrete pressure pipe the Defendant, INTERPACE CORPORATION, intended to manufacture. By its failure to properly review these submittals, the Defendant, CH2M HILL, SOUTHEAST, INC., allowed the Defendant, INTERPACE CORPORATION, to manufacture a lesser quality pipe than was called for in the specifications. In so doing, the Defendant, CH2M HILL SOUTHEAST, INC., negligently failed to discharge its obligation to require the Defendant, INTERPACE CORPORATION, be held to the strict standards called for, and thereby failed to discharge its responsibility to the Plaintiff, PINELLAS COUNTY;

(S) Failed to reject shop drawings submitted by the pipe manufacturer, Defendant, INTERPACE CORPORATION,

which included the specification of ASTM 648-73 which in turn permitted, or in the alternative, is claimed to have permitted by Defendant, INTERPACE CORPORATION, the use of "Class IV" wire since the specification of ASTM 648-73 does not include within its specification an upper tensile limit for Class III wire. In turn, the Defendant engineer was permitting the use of a class of wire not provided in the original specifications and contracts and a class of wire which was totally different in kind than Class III wire, with a higher tensile strength than contemplated by the standard which sanctioned Class III wire; and

(T) Failed to require the Defendant, INTERPACE CORPORATION, to meet the requirements of the contract specifications contained in Plaintiff's Exhibit "A" and in Section 1.9 of AWWA C-301-72, requiring the provision of wire test specimens and other steel test specimens to the purchaser or its agent.

67. As a direct and proximate result of the negligence of the Defendant, CH2M HILL SOUTHEAST, INC., the Plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars as more particularly described in Paragraph 14.

COUNT X
BREACH OF CONTRACT OF CH2M HILL SOUTHEAST, INC.

68. The Plaintiff, PINELLAS COUNTY, realleges and reavers Paragraphs 1 through 14, Count I, above.

69. The Plaintiff, PINELLAS COUNTY, realleges and reavers Paragraphs 64 through 67, inclusive, Count IX, above.

70. The Defendant, CH2M HILL SOUTHEAST, INC., breached its contract with the Plaintiff, PINELLAS COUNTY, in the manner described in Paragraph 66.

71. The Plaintiff, PINELLAS COUNTY, has performed all conditions precedent required under the contract, Plaintiff's Exhibit "B".

72. As a direct and proximate result of the breach of contract by the Defendant, CH2M HILL SOUTHEAST, INC., the Plaintiff, PINELLAS COUNTY, has been damaged in a sum in excess of Sixteen Million Dollars as more particularly described in Paragraph 14.

WHEREFORE, the Plaintiff, PINELLAS COUNTY, sues the Defendant, CH2M HILL SOUTHEAST, INC., for damages in a sum

in excess of Sixteen Million Dollars plus prejudgment interest and costs of this action.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail hand-delivery to G. LEE GARRETT, JR., ESQUIRE, 3300 First Atlanta Tower, Atlanta, Georgia, 30383; by U.S. Mail to: / STEPHEN BULL, ESQUIRE, Suite 1200, 111 North Orange Avenue, Orlando, Florida, 32801; by hand-delivery to: JEFFREY S. O'BRIEN, ESQUIRE, P.O. Box 3542, St. Petersburg, Florida 33731; and /by U.S. Mail to: MICHAEL J. KEANE, ESQUIRE, P.O. Box 31687, St. Petersburg, Florida 33732-1687 this 25th day of May, 1988.

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APPENDIX AA

Excerpts from Appellee's, CH2M Hill, Answer Brief

APPENDIX AA

Excerpts from Appellee's, CH2M Hill, Answer Brief

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PINELLAS COUNTY, Appellant,	)	
v.	)	CASE NO. 93-01203
CH2M HILL SOUTHEAST, INC., Appellee.	)	

APPELLEE'S ANSWER BRIEF

On Non-Final Appeal from the Sixth Judicial Circuit Court
in and for Pinellas County, Florida

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f. There can be no "due process" or "access to court" denial in rejecting the County's claims

The County argues in part that its constitutional right to due process, and its access to the courts, will be denied unless it can open up for retrial the multitude of matters which the court in *Hill I* foreclosed. The argument is emotional nonsense. No process or access rights have been impaired if the County had a trial and an appeal (which it did), and if the appellate court considered and rejected its contentions as legally improper (as it did). Access was fully availed of, 54 process was amply provided, 55 and the County simply did not prevail. The constitution does not guarantee a "win" to Pinellas County.56

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54 The County had a year-long "day in court" on the issues it framed for trial.

55 The appellate process was more than ample, given the expanded briefing rights, massive appendices provided, and the lengthened oral argument times.

56 There is no lack of justice or process in denying the County a belated opportunity to replace its claims of tort breach with a new "contract" name. The County cannot have it both ways: first cloak all manner of breaches within two theories which lack factual and legal veracity, and then when unmasked cry "constitutional violation" in order to reintroduce them with a new *nom de plume*. *Company Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So.2d 561 (Fla. 1988).

Supreme Court, U.S.
FILED
AUG 22 1994
OFFICE OF THE CLERK

(3)

CASE NO. 93-2071

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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CASE NO. 93-2071

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent CH2M Hill Southeast, Inc. (Hill) files this brief in opposition to the petition for writ of certiorari brought by Pinellas County to review *Pinellas County v. CH2M Hill Southeast, Inc.*, 638 So. 2d 68 (Fla. 2d DCA 1994). Hill respectfully requests that the Court

deny the petition to review that decision, here referenced as "***Hill Two***."

The petition presents no valid claim under the United States Constitution, as the *Hill Two* decision is a fact-bound determination which is substantively grounded in *state* law concepts. The County's thematic contention that it has been denied the opportunity to present "well pled" contract claims in a lawsuit against Hill, and hence access to the courts, is simply not borne out by the record.

In two elaborately briefed and thoroughly argued appellate proceedings, the Second District Court of Appeal of Florida found from the County's contract with Hill, and from the County's First Amended Complaint in its suit against Hill, that the only contract breach *well*-pled by the County inhered in the so-called "class IV wire" issue which *has been* preserved for the County to pursue. There has been no error in process due the County, either of a constitutional or other dimension.

OPINIONS BELOW

In addition to the opinions and orders which the County has brought to the Court's attention, the Court should consider the mandate of the Second District which followed its decision in *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So. 2d 85 (Fla. 2d DCA), *review denied*, 613 So. 2d 7 (Fla. 1992), for convenience referenced as "***Hill One***." That order, which forms the foundation for the action of the trial court of which the

County now complains, is reprinted as Appendix 1 to this brief.

STATEMENT OF THE CASE

A. Introduction

The County's Statement of the Case is both inaccurate and incomplete. It also contains a number of argumentative assertions which are unsupported by the record of the proceeding below. Consequently, pursuant to Supreme Court Rules 15.1 and 24.2, Hill presents this corrected statement of the course of this proceeding from an invalid first trial through two Florida appellate proceedings.

B. The trial

This proceeding went to trial in 1989 on the County's First Amended Complaint against Hill, alleging negligence and breach of contract. (Appendix M). The County's allegations of contract breach by Hill were contained in a one-sentence Count of the complaint which merely incorporated by reference the twenty-two, detailed *tort* allegations contained in another Count of the complaint. (Appendices M-24 through M-30; Z-77 through Z-83). Following a one-year non-jury trial, the trial court signed a 200-page final judgment for the County which was drafted by counsel for the County, and which held

for the County on every imaginable legal and factual theory.[1/] (Appendix 2-16; Appendix G-3).

C. The *Hill One* appeal

Hill appealed to the Second District. In its appeal, Hill raised a host of issues ranging from disqualification of the trial judge to the legal soundness of the County's tort, contract and damage claims. All contract breach allegations of the County were brought before the Second District in Hill's appeal (Appendix 2), and the Second District considered all of those issues.

In due course, the Second District reversed and vacated the County's judgment, and remanded for a new trial. In addition to finding disqualifying improprieties by the trial judge, the court expressly held that Florida law barred all of the County's tort claims, precluded the County's theory of merging the Hill Contract with an unrelated contract between the County and the pipe manufacturing company, Interpace, and foreclosed all alleged contract claims under a plain reading of the Hill Contract other than one which was properly pled as an alleged breach of design responsibility under the Hill Contract. (Appendix G). The court held that Hill was entitled to "judgment as a matter of law on all issues save one" (Appendix G-5) after a "reading of the Hill Contract, a function wholly within our scope of review [Florida state law citation omitted]." (Appendix G-6).

1/ Hill has attached its initial brief in *Hill One* as Appendix 2 to this brief, as only excerpts from the brief were filed by the County as its Appendix W.

The only issue on retrial was to be whether it was a breach of Hill's "design responsibilities [to allow] the pipe manufacturer to use class IV wire for the pipeline." (Appendix G-7).

The County filed a motion for rehearing, for certification to the Florida Supreme Court and for clarification, in which it argued at length that the court improperly rejected contract claims other than the class IV wire issue.[2/] The court denied rehearing,[3/] and subsequently issued its mandate commanding "that further proceedings be had in said cause *in accordance with the opinion of this Court* . . . ." (Appendix 1-1) (emphasis added). The decision of the Second District in *Hill One* was taken by the County for discretionary review to the Supreme Court of Florida, and became final for all purposes when that review was denied.[4/]

The decision of the Second District in *Hill One* is *not* before the Court for review at this time, although as will be detailed that is the intent of the County's petition.

2/ The County's motion for rehearing in *Hill One* is attached as Appendix 3.

3/ The Second District's order denying rehearing is attached as Appendix 4.

4/ Appendix 5.

D. Proceedings on remand before the trial court

On remand following the Second District's decision in *Hill One*, the County again challenged the restriction that retrial be had only on the one issue of a possible design breach regarding the use of class IV wire. The County's position before the trial court with respect to the opinion of the Second District pulled no punches:

> Frankly, it's a preposterous Opinion, it absolutely flies in the face of everything that we know about construction documentation, but that's what they have done.

(Transcript of hearing before the Pinellas County Circuit Court on March 3, 1993, an excerpt of which is attached as Appendix 6, at 6-8).

After hearing argument from counsel and reviewing memoranda of law, the trial court entered partial final judgment in exact conformity with the opinion and mandate of the Second District. (Appendix D). In due course, the trial court also denied the County's motion for rehearing. (Appendix F).

E. The *Hill Two* appeal

The County appealed the trial court's partial final judgment to the Second District on the ground that the Second District's opinion in *Hill One* had improperly restricted the issues on retrial. The County

necessarily addressed the state law doctrine of "law of the case," and it asserted that the trial judge was wrong in entering an order which complied with the appellate court's mandate. (Appendix Z). In support of its arguments, the County made the entire record of the *Hill One* appeal a part of the record of the *Hill Two* appeal. (Appendix Z-6).

After full briefing and oral argument, the court affirmed the trial court's partial final judgment in a summary decision which re-approved the limitation on retrial to only one contract issue, citing to the court's earlier *Hill One* decision. (Appendix A). A subsequent motion for rehearing by the County was denied. (Appendix C).

ARGUMENT

I. There has been no due process violation in the state court proceeding, whether characterized by the County as lack of opportunity to be heard or a denial of access to the courts.

The County's petition to the Court recognizes that any claim of due process denial or access to court is dependent on the presence of "well pled" allegations.[5/] The Second District had held in its *Hill One* decision, from careful review of the Hill Contract and the County's First Amended Complaint, that under Florida law the County had only one well-

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5/ The term "well pled" appears in the County's petition on pp. 4, 12, 14, 15, 16, 20 and 28.

pled contractual claim. The County's First Amended Complaint was found by the court to be a potpourri of impermissible legal theories, all but one of which had no record or legal foundation under Florida law.

Quite unremarkably, the Second District rejected as a matter of state contract law the County's "merger" of contract theory, by which the County sought to bind Hill to perform promises made by the pipe manufacturer in its wholly distinct contract with the County. The Second District applied Florida law which made untenable the legal theory on which the County postulated Hill's enlarged contractual liability. (Appendix G-6 and 7). The Second District further refined the limited range of Hill's potential contractual liability with a meticulous review of the terms of Hill's contract with the County -- a function the Second District appropriately recognized as being within its scope of review under state law. (Appendix G-5 and 6). That analysis eliminated the County's contention that Hill was responsible for the manufacturing oversight of the pipe segments, a premise for contractual liability found nowhere within the terms of Hill's contract with the County. The Second District also rejected the County's negligence claims, on another independent and adequate ground of Florida jurisprudence -- the "independent tort" doctrine which insists that an allegation of tort be more than an assertion of an egregious breach of contract. (Appendix G-5).

The *Hill One* decision of the Second District quite clearly sorted the well-pled wheat from the improperly-pled chaff. The record review and analysis performed by the Second District in *Hill One* was conducted on well-recognized grounds of Florida

contract law, clearly articulated in the *Hill One* decision as independent and adequate for its decision. *Michigan v. Long*, 463 U.S. 1032 (1983).

The *Hill Two* decision of the Second District arises from the County's insistence that the court revisit and re-evaluate its *Hill One* decision. The contract issues decided in *Hill One* were simply re-argued in *Hill Two*, and the court's decision in the second appeal was nothing more than a summary re-affirmation of the *Hill One* determination that the County had only one well-pled contract issue. Thus, the decision of which the County now complains is not the *Hill Two* decision presently before the Court, but rather the *Hill One* decision which had much earlier become final and unreviewable.

The first point on appeal argued by the County in *Hill Two* was a discussion of Florida's "law of the case" doctrine. (Appendix Z-3). Hill answered the County's analysis of that state law doctrine with its own analysis of the doctrine, and it pointed out as well that the Florida appellate rule governing rehearing made the County's re-argument of *Hill One* untimely. (Appendix 7). The Second District's decision in *Hill Two* is fully supported both by the Florida doctrine of "law of the case," and by the Florida rules of appellate procedure governing rehearing.

By its request for review, the County now asks the Court the same basic question that it posed to the Second District in *Hill Two*: whether the *Hill One* decision was correctly decided. The Court could attempt the same evaluation of the record of the *Hill One* case in search of an answer, but the Court's labor

can be shortcut simply by looking at the Statement of the Case in the County's Petition. There the County has included a section entitled "Summary of Well Pled Breach of Contact Allegations." (Petition 4 through 9). That Summary establishes beyond any doubt why the Petition should be denied.

The County's recitation of allegedly "well-pled" contract claims (Petition 5 through 9) are *exactly* the claims made in its initial brief to the Second District as a prelude to arguing Florida's "law of the case" doctrine. (Appendix Z-20 through Z-32). These claims were responded to by Hill, point-by-point, in noting for the Second District that each claim was traceable to issues rejected in the *Hill One* decision. (Appendix 7-25 through 40).

The *Hill Two* decision of the Second District is fully supported by Florida's law of the case doctrine: a clearly delineated, independent state law ground that was presented by the County and argued by both parties. Indeed, the County's petition does not suggest, because it could not, that the law of the case determination in *Hill Two* is anything other than an independent and adequate state ground for decision.

Were the Court to go beyond a facial review of the issues before the Second District in *Hill Two* to an independent analysis of the County's complaint, the Hill Contract, and the decision of the Second District in *Hill One*, the Court would find beyond any doubt that the basis for the County's complaint of due process violations is grounded in the *Hill One* decision. The allegations enumerated by the County in its Petition are, on their face, either *tort* claims, "merged contract"

claims, or "manufacturing oversight" claims from a different contract, all of which the Second District held in the *Hill One* appeal were impermissibly framed by the First Amended Complaint.

For example, the County's very first allegation is that Hill was responsible for duties imposed on the pipe segment manufacturer -- Interpace -- by a separate contract between the County and that company. (Petition 5). The Second District held in *Hill One*, however, that:

> No responsibilities contained in the Interpace Contract could be imposed upon Hill . . . .

(Appendix G-7). Plainly, the County is now arguing to this Court that it has a well-pled contract claim against Hill for manufacturing responsibilities, despite the decision of the Second District in *Hill One* (merely re-affirmed in *Hill Two*) that it does not.

As a further example, the County's second allegation in the Petition is that Hill had a duty to inspect the manufacturing of the pipe. (Petition 5). Yet the Second District in *Hill I* held:

> We find no provision in [the County's contract with Hill] which imposed upon Hill a responsibility with respect to the pipe manufacturing process.[6/]

6/ Appendix G-6.

Here again, the County has argued its dissatisfaction with the *Hill One* decision, rather than the decision for which review is presently sought. And so it goes down through the County's list of alleged contract claims -- all of which were responded to in detail by Hill before the Second District.

The Court will also note that all of the County's so-called "well-pled" contract claims are, again, the mere incorporation by reference from its First Amended Complaint of the detailed *negligence* count allegations contained in that document. (Appendix M-24 through M-30). Despite the fact that these were scrutinized by the Second District for its *Hill One* decision (Appendix G-5 and 6), they were re-asserted before the Second District in *Hill Two* and are now re-argued here. Once again, they are presented without any attempt to excise the tort-based, contract-merged and prohibited "manufacturing oversight" claims that the Second District found to be unavailable in *Hill One*. Obviously, the County has brought to the Court nothing but its high degree of frustration with the *Hill One* panel's decision that the County pled only one valid contract claim against Hill.

As a further expression of its dissatisfaction, the County has seen fit to season its petition with references to a number of events and rulings by the Florida courts which have no value other than providing the County an outlet to vent its displeasure.

(1) The County complains that disqualification of the trial judge prior to the *Hill One* decision was unfair (Petition 10 and 11), yet the County

does not suggest to the Court that disqualification of the trial judge constituted a denial of due process.

(2) The County describes denials of interlocutory certiorari petitions (Petition 12 and 13), but it makes no attempt to connect that recitation with anything at issue before the Court.

(3) The County discusses the composition of the Second District's oral argument panels in *Hill One* and *Hill Two* (Petition 14), but it presents no argument that the panel compositions denied the County due process of law.

(4) Indeed, a majority of the appendices to the County's petition have no relevance whatsoever to any issue of due process denial which the County has raised. (*See* Appendices H, I, J, K, L, N, O, P, Q, R, S, T, V, X and Y).

These several comments and appendices are completely irrelevant to the County's petition for writ of certiorari, and they form no basis for any argument regarding a denial of federal constitutional rights.

The County's inability to focus on a precise legal issue without incorporating into its allegations and argument an entire universe of perceived ills, is exemplary of the manner in which its arguments were presented to the Second District in the two appeals which resulted in the *Hill One* and *Hill Two* decisions. The County remains unable to accept the binding determination of the *Hill One* decision that its confusing potpourri of allegations and legal theories do not translate into well-pled causes of contractual breach

under Florida law. The County remains locked in a perception of massive harm caused by Hill, and it is simply unable to accept the first decision of the Second District which analyzed with care its complaint and its contract with Hill, only to find that it had but one legal basis for pursuing a claim of contractual breach.

II. The County has provided no plausible basis for the Court's review.

The collection of cases amassed in the County's petition provides no authority for its constitutionally-cloaked charade. Minimal discussion of the lead cases demonstrates their irrelevance to the sound state law analyses of the Second District in *Hill One* and *Hill Two*.

In *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422 (8th Cir. 1986), landowners sued in federal court under the Civil Rights Act when city commissioners conceded in the course of state court proceedings that their filing of a condemnation counterclaim was merely to halt an action against them for the faulty operation of a sewer facility which had contaminated private holdings. In a legal determination which the Eighth Circuit recognized to be unique to Civil Rights Act litigation, that court found an unpled claim of denied court access based on facts alleged by the landowners' *federal* complaint for conspiracy. 780 F.2d at 1427. The Eighth Circuit did not determine that the state courts had denied access to the landowners, but that the federal district court had improperly dismissed the landowners' federal complaint under section 1983 of the Civil Rights Act. A section

1983 claim for denied access to the courts was found to be based on the commissioners' retaliatory filing of a condemnation claim in state court, in response to the landowners' complaint for injunction and damages. *Harrison* provides no support for the County's ephemeral claim that the state appellate court has denied it access to the courts by the rejection of ill-pled claims of contract breach.

Similarly unrelated to the County's case is *Procup v. Strickland*, 760 F.2d 1107 (11th Cir. 1985), in which the denial of a prisoner's access to court was founded on a blanket rule of the federal district court by which it refused to consider any of the *pro se* claims filed by the prisoner. The court merely held that, even if the prisoner had abused the courts by his persistent filings, there could be no absolute rule revoking his access for presenting grievances against his jailers. *Procup* has no principled resemblance to the County's circumstance. It has had more than full and fair access on its poorly pled potpourri of claims. It twice had full access to and appellate consideration of the same state grounds for analyzing its pleading and written contract with Hill.

A third, cited decision is *Monroe Division, Litton Business Systems, Inc. v. De Bari*, 562 F.2d 30 (10th Cir. 1977), dealing with the trial court's failure to conduct a requested evidentiary hearing on damages. That refusal rested, in part, on the district court's failure to recognize that preliminary hearings on injunctions had not provided an opportunity for De Bari to present evidence of his damages. In contrast, the County in this case, had abundant opportunity to plead contract claims, including the right of amendment (which it

exercised). It simply failed to plead a Florida law basis for more than one contract claim.

Wolff v. McDonnell, 418 U.S. 539 (1974), stands for the important, but here inapposite proposition that when a state establishes a right not otherwise required by the constitution, that right can be extinguished only by resort to procedural due process. The case involved a prisoner's right to "good-time" reductions in his sentence, of which he was deprived without recourse to procedures consistent with due process. No state court has denied the County notice or an opportunity to allege contract claims against Hill which would have been consistent with substantive standards of state law.

So, too, is *Hoōks v. Wainwright*, 352 F. Supp. 163 (M.D. Fla. 1972), outside the bounds of useful principle here. In that case, the court determined that Florida's prison administrators had denied inmates access to the courts because neither lawyers nor adequate libraries were available to them. It cannot be said that the County has been denied the opportunity to prepare and present its case to the Florida courts.

The least relevant authority provided by the County is *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986). *Ariyoshi* involved 60 years of litigation, culminating (temporarily) in the drastic decision of the Hawaii Supreme Court to overrule, on its own determination, Hawaii's established system of water rights law. There was no prior opportunity for landowners to demand just compensation for property rights in prior, vested years once the court newly-declared an unprecedented territorial water rights system. When rehearing was

sought by divested water owners, they got no discursive response on the due process and just compensation claims that were presented. In this unique circumstance, the Ninth Circuit found no inhibition to the federal court's enjoining the taking of landowners' property without appropriate condemnation proceedings. The County points to no cataclysmic change made by the *Hill Two* decision to Florida's substantive law of contracts. That law has not been altered one whit, and the County had full notice of the precedents utilized by the Second District in reaching its decision.

In sum, the precedents relied on by the County to make its case for a due process deprivation are inapt here, reminiscent of the admixture of theories which marked its pleadings and arguments in the lower courts. The County has established no plausible basis for certiorari review.

CONCLUSION

Due process has been accorded the County in protracted state court proceedings. The courts of Florida were accessed at length by the County.

The decision of the Second District was a soundly-based, re-affirmation of the court's rejection of implausible pleading theories presented by the County. The Second District had properly and legally limited the County's claims against Hill, in its *Hill One* decision, to one well-pled contract claim. There is no reason for the Court to grant certiorari review of the *Hill Two* decision.

Respectfully submitted,

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CASE NO. 93-2071

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX 1

MANDATE

FROM
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STYLE: CH2M Hill Southeast, Inc. v. Pinellas County

COUNTY: Pinellas

APPELLATE CASE NO: 90-02027, 90-02028, 90-03562, 90-03563

TRIAL COURT CASE NO: 83-13313-8

This cause having been brought to this Court by appeal and after due consideration, the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings be had in said cause in accordance with the opinion of this Court and with the rules of procedure and laws of the State of Florida.

WITNESS, the Honorable Jack R. Schoonover, Chief Judge of the District Court of Appeal of the State of Florida, Second District, and the seal of the said Court at Lakeland, Florida on this day.

June 8, 1992

/S/
WILLIAM A. HADDAD
CLERK, DISTRICT COURT OF
APPEAL OF FLORIDA, SECOND
DISTRICT

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Case Nos. 90-02027 and 90-02028

MADISON MANAGEMENT GROUP, INC.
and CH2M HILL SOUTHEAST, INC.,

Appellants,

v.

PINELLAS COUNTY, FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT
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entered in the Sixth Judicial Circuit
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Introduction

This appeal comes from a final judgment awarding Pinellas County $19.8 million against CH2M Hill Southeast, Inc. ("Hill"), design engineers on the County's 1975 purchase and installation of a 13.5 mile pipeline to carry drinking water from Pasco County wellfields to Pinellas County. The award represents the cost of constructing and installing a completely new and upgraded 13.5 miles of pipeline, to replace the pipeline which has been used for the past 12 years and is still being used.

The trial lasted from January 1989 to January 1990. The trial transcript contains 14,000 pages, the record comprises 265 volumes, and the index to the record on appeal is itself 437 pages long. The lower court's final judgment, which was prepared by counsel for the County, is 200 pages long, contains 1,164 footnotes, and took plaintiff's counsel over 1000 hours to draft. (V. 124 at 18442).

Practical necessity limits the points on appeal to the most compelling legal errors, starting with the lack of a fair and impartial trial. Actions taken and comments made by the trial judge during the course of trial created a reasonable belief among Hill's principals that the trial judge was biased in favor of the County. As a matter of law, the trial judge was required to disqualify himself when Hill presented timely and legally sufficient motions for disqualification. Even under the conditions Hill was required to endure during trial, however, the County failed to establish Hill's liability on any basis for a $19.8 million award.

Throughout this brief, the trial transcript will be referenced "(V.)."

Statement of the Case

Pinellas County sued Hill, with whose predecessor (Black, Crow & Eidsness, Inc.) it had contracted for the design of 13.5 miles of pipeline, for alleged negligence and breach of contract. (V. 8 at 972-80). The suit included an action against the manufacturer of the pipe, Interpace, Inc. (now known as Madison Management Group, Inc.), for negligence, breach of contract, breach of warranty, strict liability and fraud. *Id.* at 960-72. The case was tried without a jury to Judge Fred Bryson.

On the morning of October 10, 1989, during the course of trial, Hill filed a verified motion seeking to disqualify Judge Bryson from proceeding further in the case. (V. 19 at 2628-3042). Immediately following presentation of the motion, Judge Bryson adjourned court for the day. When court reconvened the next morning, Judge Bryson gave Hill's counsel an opportunity to withdraw the motion, made some comments of his own about the motion, and then adjourned until the County was prepared to argue against the motion. (V. 102 at 15194-205). On October 16, Judge Bryson heard three hours of argument by the County, received affidavits from the County in opposition to the motion, and accepted memoranda of law from the parties. On October 17, he denied tho motion. (V. 24 at 3281-84).

On October 24, Hill filed a petition for writ of prohibition in this court, which was denied on October 27 without requiring a response. A second motion to disqualify Judge Bryson was filed on November 3 and orally denied on November 6. (V. 104 at 15488). Hill again filed a petition for writ of prohibition with this court on November 16, and the court again denied the petition without requiring a response.

Following the close of evidence in January 1990, the trial judge directed all parties to submit proposed findings of fact and conclusions of law. (V. 123 at 18430-431). The parties complied, with the County's counsel submitting a 200 page proposed final judgment, containing 1,164 footnotes. (R. at 3966-4244). Closing arguments were held on June 2, and four days later Judge Bryson signed the County's proposed final judgment without changing a word, a comma or a footnote. *Id.*

Hill filed a timely notice of appeal. After extensions of time to file briefs as a result of circuit court clerical difficulties preparing the record on appeal, the parties eventually agreed to the submission of briefs on prescribed dates without citations to the record, and a later substitution of briefs containing record citations within 15 days after the record index was served. The court has authorized briefs of up to 75 pages.

Statement of the Facts

On March 24, 1975, Hill entered into a contract with Pinellas County to perform specified engineering

services in connection with the design of a water distribution pipeline for the County (the "Hill Contract"). The Hill Contract obligated Hill to design a pipeline that would operate at 100 psi (pounds per square inch), as set forth in the County's Ten Year Master Plan. (V. 128 at 19042 p. 2). That Master Plan established basic assumptions and design criteria for all future pipeline pressures, setting distribution operating pressures at "an absolute maximum of 100 psi" and main pipe transmission line pressures at never more than 100 psi.[1/] (V. 224 at 27214 p. 5-4).

The 13.5 mile pipeline was to consist of 3,400 pipe segments, each of which is approximately 20 feet in length. The pipe segments were made with a concrete inner core, steel cylinder, concrete outer core wrapped with high strength wire, and covered with slurry and mortar coatings. The pipeline was routed predominantly through pasturelands, farms, and utility rights of way. (V. 245 at 27758).

The Hill Contract divided engineering responsibilities into four categories, labelled as follows:

1/ In designing a *Pipeline* for 100 psi operating pressures, Hill specified an additional 50 psi pressure capacity for the manufacture of pipe segments as a safety margin, and then added a 60 psi surge capacity. The County's contract with the supplier specified that pipe segments were to have a 150 psi capacity. (*See* V. 219 at 26961-27144 pp. 126-32; V. 220 at 23153; in contrast to V. 128 at 19043 pp. 15069-1 [REV], 19041 p. 10 §3.2.3).

Item A - Design of Improvements
Item B - Professional Services During Construction
Item C - Resident Project Representation
Item D - Supplementary Services

The Hill Contract expressly required the County to authorize services in writing before Hill became responsible to perform services in any of the four categories. (V. 128 at 10942 pp. 3-5).

Hill received authorization from the County to perform design services under Item A on March 26, 1975. (V. 240 at 27671). Item A responsibilities contemplated design of the pipeline, concluding with engineering recommendations in regard to the award of the construction contracts. Hill's services under Item A were completed on January 5, 1977. (V. 243 at 27732).

Hill's specifications for the pipeline segments required the manufacturer of pipe segments to comply with standards promulgated by the American Water Works Association ("AWWA"), and more specifically for reinforced concrete pressure pipe with steel cylinder prestressed "in accordance with AWWA's C301." (V. 128 at 19043 p. 15060-1 [REV]; V. 244 at 27666). The specifications also required that the owner of the pipe segments (which had become the County itself) receive assurances from the supplier that the pipe segments were manufactured in accordance with AWWA standards. (V. 128 at 19043 pp. 15060-1 [REV], 15060-2 [REV], 1010-3).

Specifications for the manufacture of pipe segments provided that the County and/or its engineer

could inspect the pipe manufacturing process. (V. 128 at 19043 p. G-2 - G-3 [REV]). The Hill Contract, however, required County authorization (which was never given) before Hill could provide inspection services at the manufacturing site. (V. 128 at 19042 p. 4).

The 1975 Hill Contract had contemplated as an Item A service that Hill would draft a "traditional" construction contract for a general contractor with whom the County would contract to install the pipeline, and who In turn would be responsible to purchase the pipe directly from the pipe manufacturer. (V. 76 at 11177). In order to take advantage of its governmental exemption to avoid the payment of sales tax on the purchase of pipe segments, however, the County in September 1976 elected to hire a general contractor only for installation of the pipeline, and to contrast directly with a pipe manufacturer to purchase pipe segments. (V. 128 at 19042). The County's decision to have a separate pipe purchase contract was made approximately a year and a half after execution of the Hill Contract -- after Hill had performed virtually all of its Item A design services. (V. 76 at 11179).

Interpace was recommended as the low bidder for the manufacture of pipe segments for the project on January 5, 1977. (V. 97 at 14401-402; V. 243 at 27732). The County awarded a contract for the manufacture of pipe segments to Interpace (the "Interpace Contract") based on its lowest responsive bid, its widely-recognized reputation as one of two primary pipe manufacturers on the east coast of the United States during the 1970's, the utilization of Interpace's prestressed concrete pipe in hundreds of cities throughout the country, and the

County's own use of Interpace's prestressed concrete pipe in over 40 miles of the Pinellas County water system. (V. 44 at 6643-44; V. 66 at 9858; V. 67 at 9943; V. 128 at 19043 p. B-3 [REV] 1005).

Hill was not a signatory or party to tho Interpace Contract. The County was identified in the contract as "resident engineer," and Hill was named as "engineer." (V. 8 at 1018-23).

Pursuant to the terms of its contract with Hill, the County authorized Hill to perform Item B, installation-phase services in connection with the Pinellas County water system in early 1977. (V. 240 at 27666). Hill's Item B services contemplated an average of four visits to the installation site each month, but also expressly stated that its visits did not guarantee the contractor's performance. (V. 128 at 19042 p. 4). The last, unnumbered paragraph in Item B provided that Hill's professional service did *not* include "the testing of materials or the furnishing of resident project representatives, field engineers and inspection personnel." Hill fulfilled all of its obligations under Item B of the contract and a limited number of specially-requested Item D services, and the County accepted the project as substantially complete as of October 2, 1978. (V. 245 at 1172, 1173).

> No work was ever authorized by the County for Item C, "resident engineer" services. Those services were "to observe the construction work of the contractor on a daily basis [including] field observation, inspection of materials and work, preparation of details for the prosecution

of the work, and other detailed inspection and complex reportage requirements. (V. 128 at 19042 p. 5). The County elected to utilize its own engineering staff to accomplish these responsibilities, including daily inspection of the installation and construction of the pipeline. (V. 96 at 14225, 14231, 14235-236, 14256). Pipe segments were inspected and accepted on site by Bumbey & Stimpson, the County's installation contractor. (V. 98 at 14617-619).

The Interpace Contract, to which Hill was not a party, defined Interpace as the "supplier." It required Interpace to furnish evidence that the materials and finished articles met appropriate manufacturing standards prior to their delivery to the pipeline site. (V. 8 at 995, SC-03(B)). Interpace in fact submitted shop drawings which specified that pipe segments would be manufactured "in accordance with AWWA specifications C-301-72." (V. 128 at 19045). Those specifications allowed the minimal tensile strength for wire in the pipe segments to exceed class II wire if the wire met the other requirements for class II wire. (V. 128 at 19041 C-301-72, para. 2.8.1). Interpace selected and used class IV wire in its pipe segments. County experts testified that class IV wire used en this project passed all test requirements specifically identified under AWWA standards. (V. 38 at 5716; V. 44 at 6709-10; V. 60 at 8823-24, 8874; V. 61 at 8807-11; V. 121 at 18137-139).

Prior to executing its contract with Interpace, the County obtained tests on pipe segment samples taken

from Interpace's Lacoochee pipe manufacturing plant. (V. 84 at 12411-415; V. 96 at 14257-258). Later, acting under authorization in its contract with Interpace, the County repeatedly inspected the pipe segment manufacturing plant.[2/] (V. 96 at 14229-231, 14245-246). As a result of a tip from a pipe manufacturing competitor and its own visits to Interpace's facility, the County suspected that aggregate used to manufacture the cores and concrete coating of pipe segments was inadequate. (V. 96 at 14256-259).

The pipeline had been in operation for nearly 12 years at the time of trial. Throughout that time the water pressure in the pipeline was normally below 100 psi. (V. 62 at 9114; V. 84 at 12463-471; V. 95 at 14052). On November 13, 1979, one segment of prestressed concrete pipe broke in the pipeline during a lightning storm which interrupted power to pumps and caused a surge in pressure that was unchecked because a county operator had disengaged a bypass valve. (V. 98 at 14580-586, 14645-655; V. 131 at 19385 p. 44). This was the only in-service rupture of the pipeline up to and through the conclusion of trial in January 1990.

On December 20, 1980, a pressure test was conducted by the County which resulted in a rupture of one segment of prestressed concrete pipe. Following the test, the County excavated 10 pipe segments north of the break, submitted all of these pipe segments to its experts, and found no indication of any comparable pressure defect. (V. 71 at 10554-557; V. 220 at 2750,

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2/ A Hill representative on approximately three occasions also observed the manufacturing process for this pipeline at Interpace. (V. 97 at 14358).

2715). County experts subsequently inspected an additional 800 segments of pipe, comprising nearly three miles of pipeline. These pipe segments were found to be acceptable. They were left in the pipeline and continued to function through the trial. (V. 42 at 6405-12; V. 71 at 10557-558).

After the pipe segment's failure under the County's pressure test in December 1980, the County instituted a monitoring and repair program for the pipeline. The program began with a 1981 "over-the-line" survey to locate potentially corroded pipe segments in the pipeline. (V. 70 at 10404-405; V. 221 at 27161). Using this screening method, the County excavated 10 suspect pipe segments and examined them for defects. (V. 221 at 27161). Each segment was found to be in good condition, left in the pipeline, and continued to function through the trial. (V. 43 at 6488-500).

The County conducted another pressure test of the entire pipeline in 1982, subjecting it to a sustained pressure of 150 psi. The pipeline passed the pressure test without incident. (V. 43 at 6489-92; V. 82 at 7977-79; V. 221 at 27162).

In 1983, the County conducted a number of over-the-line surveys and excavations, resulting in the selection of 70 pipe segments to be examined for defects. Those pipe segments selected for testing were from areas screened to show the highest potential for corrosion. (V. 43 at 6509-14). Of these 70 segments, 19 were removed for repair. The other 51 were left in the pipeline and continued to operate through the trial.

(V. 43 at 6511-42; V. 72 at 10685-689; V. 133 at 19388; V. 155 at 20320; V. 224 at 27164).

In 1984, the County conducted another over-the-line survey and repair program which identified 10 more pipe segments for testing. Each of these were removed from the pipeline for testing, and replaced. (V. 43 at 6513-16; V. 72 at 10565-717; V. 133 at 19388).

In 1985, the County conducted another 150 psi pressure test on approximately three quarters of the pipeline. The pipeline passed this test without incident. (V. 43 at 6515-20; V. 221 at 27168).

On June 1, 1989, during the trial, the County repaired a leaking manhole in the pipeline. The leak had been caused by blow holes manufactured in the rim of the manhole. (V. 211 at 26903). County inspectors had detected this manufacturing defect during the installation process and documented it five times. The County failed to correct the problem before accepting the pipeline, however. (V. 259 at 29471, 29472). The County knew about the leak itself as early as October 19, 1977, but never notified Hill. *Id.*

The pipeline originally cost the County approximately $6.5 million. For its professional engineering services, Hill was paid a fee equal to 5.62% of the project cost, or $364,939.27 (5.628 × $6,493,581.32). Judge Bryson's final judgment awards the County $19.8 million against both Hill and Interpace, of which $17.8 million represents the cost of replacing the entire 13.5 mile pipeline with a new line having components materially different from those originally contracted for. Judge Bryson declined to

clarify whether the award is joint and several, although he stated on motion to amend the judgment that the County was entitled to only one satisfaction. (V. 126 at 18860).

Summary of Argument

The trial judge was required to disqualify himself following the presentation of timely motions to disqualify made during the course of trial. The judge had engaged in actions during the trial, and made comments throughout the trial, which prejudiced Hill in the presentation of its case and created a reasonable fear in Hill's principals that the judge was biased in favor of the County. The motions for disqualification which were presented by Hill were legally sufficient on their face. Moreover, the trial judge made comments and took actions following presentation of the motions which mandated his disqualification. *E.g.*, *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla. 1990).

The trial judge erred as a matter of law imposing tort liability on Hill. The County neither alleged nor proved any tort independent of Hill's contractual duties; indeed, the County affirmatively identified Hill's alleged negligence by reference to its contractual obligations. In the absence of a tort independent of contractual duties, no tort recovery is permitted. *Lewis v. Guthartz*, 428 So.2d 222 (Fla. 1982). Nor is tort liability possible for a breach of statutes creating no private right of action and imposing obligations only on governmental agencies. In any event, tort liability against Hill cannot be sustained where, as here, there is only economic loss to the

pipeline itself, with nominal (if any) damage to other property. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987); *AFM Corp. v. Southern Bell Telephone and Telegraph Co.*, 515 So.2d 180 (Fla. 1987).

The trial court erred as a matter of law in finding Hill liable for breach of its engineering contract based on defects in the pipe segments manufactured by Interpace and as a result of Interpace's use of class IV wire in pipe segments. Hill had no contractual obligation to inspect the manufacture of pipe segments being made by Interpace. Nor was the use of class IV wire by Interpace a breach of Hill's contract, since that type of wire was in conformity with AWWA C-301-72 standards that Hill had specified. The trial court's determination that the County's contract with Interpace merged with the Hill Contract so as to impose additional contractual duties on Hill is legally unsustainable.

The trial court's award of damages equivalent to the cost of replacing the entire 13.5 mile pipeline with improved components is not sustainable by law or by the evidence. Hill has no tort liability whatsoever, and its obligation for breach of contract, if any indeed occurred, at most would warrant liability for the costs of repair. The entire pipeline had been operating as intended for twelve years at the time of trial, with only one in-service break. No competent substantial evidence was presented to sustain the trial court's conclusion that the entire pipeline must be dug up and replaced. Moreover, no theory of law authorized the trial judge to award damages for a new pipeline with

improvements and betterments that had not been contracted for originally.

Argument

I. The trial judge was required as a matter of law to disqualify himself.

Any request to disqualify a trial judge is a serious endeavor, and any attempt to do so in the midst of a complex and protracted trial has even more grave implications for the justice system. After 10 months of trial, the first 8 of which were taken up by the presentation of the County's case, Hill came to the reluctant conclusion that it was not receiving a fair trial from Judge Bryson.[3/]

Before filing a motion for disqualification, Hill submitted the trial transcript to outside counsel unaffiliated with the case for an evaluation of impartiality. (V. 102 at 15313-318). After that attorney confirmed that Hill's fear of prejudice in favor of the County was well-founded, Hill prepared and presented its first motion for disqualification. *Id.* What occurred on presentation of the motion for disqualification, and

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3/ In support of this point on appeal, Hill has created an appendix to this brief which contains representative samples of the trial judge's prejudice. This Appendix of Prejudice (cited as "App. Prej.") will provide the court with a sample of what the record bespeaks about the reasonableness of Hill's concern.

its disposition, only exacerbated Hill's worst fears of prejudice.[4/]

The legal bases for disqualification are identified in Section A below. The first issue is whether Hill's motion for disqualification, on its face, was legally sufficient and timely so as to require the judge to step aside. An application of the facts in this case to the legal tests for disqualification, demonstrating that the motion was legally sufficient, is presented in section B below. A second issue is whether, even if the motion was not legally sufficient, Judge Bryson engaged in conduct in response to the motion which required his recusal. He did, and this point is discussed in section C below.

A. The legal bases for disqualification

In *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla. 1990), the Supreme Court reiterated the time-honored requirement that facts in a motion seeking to disqualify a judge need only show a well-grounded fear that the movant will not receive fair and impartial treatment from the judge. If the motion does this, it is legally sufficient on its face and the judge has no discretion -- he must step aside.

The standard of legal sufficiency is simple and straightforward.

4/ Hill filed a second motion to disqualify based on the totality of trial events through denial of the first motion, including Judge Bryson's post-motion actions and comments. (V. 25 at 3323-503).

> In order to decide whether the motion is legally sufficient, '[a] determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.' [*Livingston*] at 1087. The legal sufficiency of the motion is purely a question of law.

MacKenzie, 565 So.2d at 1334-35, *quoting*, *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983); *see also* Rule 1.432, Fla. R. Civ. P. Three applications of this standard are pertinent here. First, the judge has no authority to pass on the truth of the allegations in the motion. In assessing legal sufficiency, the alleged facts must be taken as true.[5/] *Bundy v. Rudd*, 366 So.2d 440 (Fla. 1978); *Townsend v. State*, 564 So.2d 594 (Fla. 2d DCA 1990); *Brewton v. Kellt*, 166 So.2d 834 (Fla. 2d DCA 1964). In fact, any attempt to refute the allegations of a motion to disqualify is disqualifying conduct in and of itself. *MacKenzie*, 565 So.2d st 1339; *Gulfstream Park Racing Ass'n, Inc. v. Gale*, 540 So.2d 196 (Fla. 3d DCA 1989); *Stimpson Computing Scale Co. v. Knuck*, 508 So.2d 482 (Fla. 3d DCA 1987); *A.T.S. Melbourne, Inc. v. Jackson*, 473 So.2d 280 (Fla. 5th DCA 1985). The judge must "forego the pleasures of oral condemnation." *Hayslip v. Douglas*, 400 So.2d 553, 558 (Fla. 4th DCA 1981) (Letts, J. concurring).

Second, the standard focuses not on the judge's perceptions or those of opposing counsel, but on the perception of a "reasonably prudent person" in the

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5/ Rule 1.432 provides that a judge "shall determine *only* the legal sufficiency of the motion." (Emphasis added).

shoes of the litigant. *MacKenzie*, 565 So.2d at 1342 (Overton, J., concurring) (the question "is whether an ordinary litigant would reasonably question the judge's impartiality").

Third, disqualifying prejudice of a judge includes prejudice against counsel as well as a party. *Livingston*, 441 So.2d at 1083; *Hayslip*, 400 So.2d at 553. Just last year, this court applied this aspect of disqualification in a counsel prejudice situation remarkably similar to the facts here.[6/] *Townsend*, 564 So.2d at 594. A judge's tirade against counsel in open court, of course, itself presents a legally sufficient basis for a reasonable belief that the judge cannot be impartial toward the litigant. *McDermott v. Grossman*, 429 So.2d 393 (Fla. 3d DCA 1983).

Judge Bryson violated every tenet of Florida law on disqualification. (1) He himself Passed on the truth of allegations contained in Hill's motion. (2) HQ allowed testimony from opposing counsel in contravention of those factual allegations, including a shouting tirade by counsel for the County challenging the ethics, honesty, good faith and veracity of Hill and

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6/ In *Townsend* the judge had declared: "I may be prejudiced against counsel but not against your client." 564 So.2d at 595. Judge Bryson declared in his written order denying disqualification: "The statute for disqualification . . . pertains to prejudice or bias for or against the parties in the litigation and not their lawyers. . . . [T]he Court . . . does not believe that he has been, is, or will be prejudiced for or against any of them. He . . . assures all of the parties that they will receive a fair and impartial trial *despite any feelings which he might have had toward [Hill's counsel] personally.*" (V. 24 at 3281-84) (emphasis added).

its counsel. (3) He tested the motion against his own perception of fairness, rather than analyzing the perception of a reasonably prudent lay person in Hill's position. (4) He acknowledged his prejudice against Hill's counsel in the belief that only prejudice to the party itself is relevant to disqualification.

B. The motion was legally sufficient on its face and timely.

The allegations of the motion of Judge Bryson's disqualification, supported both by appropriate affidavit of Hill's principal and by good faith certificates of counsel, presented facts which were legally sufficient to require disqualification. The allegations dealt with comments and conduct during trial which generated in Hill personnel an eminently reasonable fear of bias against the company and its attorneys.

1. Demonstrated bias in favor of the County's Position.

The first incident of tilt toward the County occurred at the outset of the trial, in opening statements. Counsel for the County was given free rein in opening statement over one and a half days to comment extensively on the County's interpretation of the contracts which governed the proceedings. When Hill's counsel attempted to assert Hill's position on the same contractual provisions (in less than a half day of opening statement), Judge Bryson interrupted him four times to point out that he had already heard about the

contracts. (App. Prej. 1, pp. 391, 415, 426, 457). The pattern was set.

In derogation of Hill's defense that its contractual responsibilities as engineer did not include testing and inspection of materials at the pipe manufacturing plant -- the very heart of the County's case -- Judge Bryson made clear that he had accepted the County's position and predetermined Hill's liability *before* any defense evidence on the issue was presented. Addressing a former Hill employee, he stated:

> THE COURT: [To Witness Henderson, former Hill employee] I appreciate how convenient it would be for you to be able to have every design engineer, every person that put pencil to parer, or put a word processor to work on any piece of paper that came out of [Hill], live in a vacuum tube, never having inhaled the odor of concrete, never having touched a piece of slag or aggregate or sand, or watched a piece of pipe being wired or anything else.
>
> But sir, I'm afraid I can't let you live that way.

(App. Prej. 2, p. 78).

Other instances of preconceptions against Hill abound in the record. (App. Prej. 3, pp. 135-44, 151-65; App. Prej. 4, pp. 1858-59; App. Prej. 5, 51-52). Worse, Judge Bryson prejudged Hill's liability based on his own views regarding pipelines and their construction,

notwithstanding that no defense evidence had been introduced on that subject. (App. Prej. 3, p. 162; App. Prej. 6, pp. 650-54).

A lack of even-handedness and Judge Bryson's overt bias are clearly seen in his treatment of evidence regarding the contracts and their interpretation, which were the crux of the lawsuit. The County presented volumes of evidence regarding the contracts and their meaning. Hill objected to interpretive analyses contrary to their plain reading. Judge Bryson overruled these objections, but gave assurance that Hill too would be allowed to develop testimony on contract interpretation. (App. Prej. 7, pp. 941-42; App. Prej. 8, pp. 1136-37). That proved not to be the case. Judge Bryson reneged on his promise and, without objection from County counsel, barred Hill's attempt to introduce contract interpretation testimony contrary to that presented by the County. (App. Prej. 3, pp. 135-36, 140-43). By accepting only the County's analysis, Judge Bryson fostered a recurring theme of applying a dual standard to the admission of evidence, laying the groundwork for his later distortion of those contracts and eviscerating Hill's opportunity to present its case.

2. Limitations placed on Hill's examination of witnesses.

During the 66 days during which the County presented its evidence over a leisurely period of eight months, Judge Bryson never curtailed the County's examination of witnesses or made critical comments of its counsel. The exact opposite was true when Hill had its turn at bat. Judge Bryson interrupted the

examination of Hill's very first witness with a directive that counsel limit the testimony to be elicited.[7/] (App. Prej. 9, pp. 70-81). Hill's next witness, its chief expert witness on engineering standards applicable to this type of pipeline project, sought to testify on the same subject as the County's chief expert witness had testified on

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7/ THE COURT: Why don't you ask him if he felt that they met the standard of care in the design of a project and engineering function, and quit?

* * * * *

MR. BULL: We sat there for seven months, your Honor, and this is our first day, our first morning --

THE COURT: Mr. Bull, we've been through everything that you've talked about, thus far, with this witness, before.

MR. BULL: Well, I think my next question might clear up some of --

THE COURT: Why don't you ask him the one question --

MR. BULL: -- John's objection

THE COURT: -- What he thinks about his opinions, as to the standard of care, as to whether it met the contract, sit down, and let those people cross examine him.

three separate occasions over a period of six weeks.[8/] Hill's expert was met with these chilling instructions:

> THE COURT: Now, why don't you get him a copy of the plans that your client

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[8/] The court cannot fully appreciate the trial court's bias without having some insight into the dominant expert testimony which forms the basis for the County-drafted, unprecedented final judgment. That judgment accepts the testimony of Mr. Robert Edmunds, a former Hill employee who was called as an expert by the County, on virtually all of the findings of negligence and contract breach in connection with the pipeline. Mr. Edmunds' qualifications as an expert were not as broad as his opinions, however.

Mr. Edmunds is a University of Florida graduate, with a masters degree in civil engineering. Before leaving Hill, he had been a design project manager at Hill. Nonetheless, and despite this seeming level of skill, in the course of some six weeks on the witness stand Mr. Edmunds gave so-called expert opinions on engineering, mathematics, contract interpretation, quality control and testing of prestressed wire and prestressed concrete pipe, metallurgy, statistics, population studies and forecasts, hydraulics, cost estimating, standards for pipe, pipelines and wire, engineers' standards of care, and hydrology -- to name a few. There was no subject area that he did not deem himself an expert. ("Q. Well, let me try to make it simple. Is there any aspect of this case, engineering aspect, that you don't think that you have expertise in? A. I can't think of an engineering aspect of this case that I don't have expertise in"). (V. 33 at 4878). A more circumspect and neutral judge would have found his testimony in several of these areas to be beyond Edmunds' realm of expertise, or at least not singularly controlling against Hill in light of the very credible, contradictory testimony of experts (some of whom were other *County* experts) who were well-qualified in the fields as to which they opined.

designed in system, have him look at them, ask him if they met the standard of care, sit back, admire your work? Because these guys are going to paw on him for the next half day. Now, I don't want to have to hear it twice.

* * * * *

THE COURT: Why don't you hand him a copy of the plans and say, 'Have you examined the plans?' And if he says 'no,' everybody in the place is going to fall off of his chair. And say, 'Do the plans meet the standard of care, or did they meet the standard of care at the appropriate time?' And then let's get on with it.

Because Mr. Allen or Mr. Seane, or both of them, or Mr. O'Brien, or whoever, I'm sure, are going to have a lot of questions in that area.

So let's take a ten minute recess. And possibly you can concentrate that strategy and, perhaps, save a day of this man's time, as well as mine.

(App. Prej. 10, pp. 44-46).

During later examination of this same witness on the third day of testimony, Judge Bryson angrily interrupted Hill's examination by again advising that counsel for Hill should frame questions in the manner

he (Judge Bryson) recommended and then "sit down." (App. Prej. 3, pp. 137-39).

The pattern continued. Hill's fourth witness, an engineer, was testifying on the standard of care. The County had been accorded unlimited time and freedom in presenting testimony on this issue. Judge Bryson pointedly suggested that Hill "can, with about three questions dispatch [the witness] from direct examination." He even proposed the questions to be asked, who looked at the plans, he reviewed Mr. Henderson's work, and he found that it met the standard of care." (App. Prej. 11, pp. 41-42).

Hill's fifth witness fared no better. He was cut off at the beginning of his direct testimony by an angry Judge Bryson shouting

> THE COURT: . . . You're not going to win or lose this case by a greater number of witnesses or a lesser number of witnesses. Now, why don't we get to the bare bones examination of this guy, which will take about ten questions, and let's get him to cross examination, and get him off the stand, and move to something else. (App. Pres. 12, pp. 7-10). The County, of course, had presented an unlimited number of witnesses. *See* Hill's initial brief in Case Nos. 90-3562 and 90-3563, appealing the cost judgment in this case.

3. Hostility toward and embarrassment of Hill witnesses.

Judge Bryson was not only an obstacle to the presentation of Hill's case he affirmatively demonstrated his hostility toward Hill's witnesses. For example, after listening to Hill's primary expert witness, Judge Bryson put this completely intemperate question in his examination:

> THE COURT: Sir, could I ask you one question? I don't mean to be insulting --
>
> THE WITNESS: Yes, sir.
>
> THE COURT: -- But I think it's something that's dictated as a product of the testimony of the last two days.
>
> Do you believe in Santa Claus?

(App. Prej. 3, pp. 225-32). It takes no imagination to assess the effect of this kind of remark on Hill's principals, its counsel or its other witnesses. *See* the affidavit of witness Browning which accompanied the motion for disqualification. (App. Prej. 13). As another example, Judge Bryson interrupted the examination of Hill's design engineer to state the witness didn't know what he was talking about, and to suggest that he should not be in the design engineering business. (App. Prej. 14, pp. 197-98; *and see* App. Prej. 3, pp. 225-32).

Not content with merely intimidating Hill's witnesses, Judge Bryson himself examined them in a

way which was overtly hostile and prejudicial to Hill's defense. (App. Prej. 2, pp. 78-79; App. Prej. 3, p. 268; App. Prej. 9, pp. 78-81, 123-50; App. Prej. 15, pp. 530-41, 549-54).

4. **Curtailed cross examination.**

One of the most essential rights accorded defendants in a civil proceeding is cross-examination. Judge Bryson, however, took it upon himself in this case to restrict, interrupt and curtail Hill's cross-examination of County witnesses, all without objection by counsel for the County. Specific examples were detailed in the motion to disqualify. A few examples are repeated here.

Judge Bryson cut off the impeachment of Pinellas County chief expert witness, Robert Edmunds, when, on Hill's cross-examination, Mr. Edmunds admitted to improperly signing and sealing certain design engineering documents on a related pipeline project, in violation of the very professional engineering ethics and statutory requirements which Judge Bryson later applied against Hill in his final judgment. (App. Prej. 16, pp. 1779-81). He interrupted and terminated a line of questioning on Hill's cross-examination of an expert for the County during questions as to the witnesses' credibility and qualifications to prepare a report regarding the pipe. (App. Prej. 17, pp. 278-79). He cut off Hill's cross-examination of another County expert as to a report placed into evidence during his direct examination, by instructing Hill's attorney to call him back as your own witness. . . . (App. Prej. 18, pp. 185-86). He chastised Hill's attorney for

cross-examination of a County witness regarding the City of Detroit's approval of class IV wire in prestressed concrete pipe. (App. Prej. 19, pp. 261-65). He terminated Hill's questioning of another County expert which showed his testimony to conflict directly with that of another County witness. (App. Prej. 20, pp. 472-73). He terminated Hill's cross-examination of the County's chief engineer regarding important admissions about his understanding of Hill's contractual duties on the original project, repeatedly initiating objections and disrupting Hill's presentation. (App. Prej. 21, pp. 80-85, 92-97). He interrupted Hill's cross-examination of yet another County expert by curtailing examination on matters which had been placed in issue by the County in its direct case. (App. Prej. 22, pp. 52-53). He interrupted Hill's impeachment and cross-examination of the County's chief expert to argue in support of the County and to protect the witness. (App. Prej. 23, pp. 43-44).

County counsel and Judge Bryson attempt to explain away and justify these multiple disruptions of the defense case as normal judicial involvement in a bench trial. They may view them that way (incredibly), but as a matter of law they must be viewed from the perspective of Hill personnel sitting in the courtroom, asking themselves whether they were getting cold neutrality and a fair trial from the presiding (and deciding) judge. Because these ordinary litigants did not reasonably believe from this cumulative behavior that they were getting a fair trial, it matters not whether the judge himself or opposing counsel can now put a plausible "spin" on this courtroom behavior.

The motion to disqualify was legally sufficient. It was also timely. The motion asserts a series of actions and comments by Judge Bryson which occurred over several months. As these hostile comments and actions poured forth from the bench, they impacted the presentation of Hill's defense to an extent that gave rise to a gnawing concern by corporate principals that a pattern was unfolding. That concern became a legitimate and well-founded fear going into the eighth and ninth months of the case, when Hill and its counsel were repeatedly rebuffed in their presentation of the defense case.

Hill had been circumspect in not acting earlier on comments and actions which suggested Judge Bryson's bias in favor of the County and hostility to Hill's attorneys, but the time for circumspection finally passed. Hill's concerns about bias finally heightened into the realty that Judge Bryson was indeed hostile and prejudiced against Hill and its counsel. Under these circumstances, the motion was both timely and in good faith.[2/] *See Lamendola v. Grossman*, 439 So.2d 960, 961 (Fla. 3d DCA 1983) (motion was filed without inordinate delay "under the circumstances of this case"); *Lake v. Edwards*, 501 So.2d 759 (Fla. 5th DCA 1987) (motion was timely although filed when all that remained of the trial was the court's ruling on a motion for new trial).

2/ That the motion was filed in good faith is evident both from the restraint exhibited by Hill in not filing the motion earlier, and by Hill's submission of the trial transcript to non-trial counsel for a pre-filing, independent evaluation.

C. Disqualifying conduct in addition to legal sufficiency of the motion.

Even were the court to hold that the motion was not legally sufficient such as to require disqualification upon its presentation, the post-filing conduct and comments of Judge Bryson unquestionably compelled his disqualification.

When Hill presented its motion to disqualify, Judge Bryson's immediate response was disagreement with the accuracy of the allegations of the motion[10/] and a challenge to counsel's good faith in presenting it.[11/] Judge Bryson then stated that the motion reminded him of a parable about the good samaritan who gave a hungry beggar a ham, and who was robbed by that beggar the next day using the hambone. (V. 101 at 15193). Hill's representatives viewed that commentary as meaning that Judge Bryson put Hill in the same category as a thief -- devastating characterization of the defendant from a supposedly

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10/ Judge Bryson indicated that he would have to go back and look at the testimony transcript for nine months of trial, which could only mean that he did not intend to accept the allegations of the motions as true for the purpose of his ruling. (V. 101 at 15192). He then declared that some of the matters contained in the motion "are taken totally out of context . . . ."

11/ Immediately following the oral presentation of the motion, Judge Bryson stated to Mr. Schooley, counsel for Hill, that the motion and matters contained in the motion "exceed the duties and boundaries and parameters of advocacy, but go into another area which I would charitably not describe." *Id.*

neutral magistrate. Judge Bryson then concluded proceedings for the day.

The next morning when court convened, Judge Bryson offered Hill's counsel (not Hill itself) the opportunity to withdraw the motion for disqualification.[12/] (V. 102 at 15197). When counsel declined to withdraw the motion, Judge Bryson took issue with the truth of the allegations of the motion, despite a twenty-four hour recess in which he said he had researched the law of disqualification. He then characterized the motion as containing "lies" of the most offensive type, in these words:

> Many years ago, someone told me that there were basically two types of untruths;

12/ Believing that the withdrawal offer was directed at Hill, Hill's counsel declined to withdraw the motion on behalf of the client. Judge Bryson immediately snapped:

> No. I'm talking to you. I'm not talking to Hill. You are the lawyer. They are the client. And I'm affording you ac a lawyer, the opportunity to withdraw the motion.

(V. 102 at 15197). This comment becomes significant when coupled with other remarks made by Judge Bryson regarding counsel for Hill, and the recitations in his later order denying disqualification to the effect that presentation of the motion was contrived, that the opportunity to withdrew was afforded because Judge Bryson did not believe that the motion was filed in good faith, that defense counsel had attempted to "goad" the judge into making intemperate remarks requiring recusal, and that disqualification pertains only to prejudice against-parties and not their lawyers. (V. 24 at 3281-84).

> lies and damn lies. But you, sir, in your motion, have crystallized yet a third one. . . . You, sir, in your motion, have taken liberties with the truth that a common curr [sic] would not take with a streetside fireplug.

(V. 102 at 15198-199).

Judge Bryson then recessed court to give counsel for the County an opportunity to respond to the motion. That response came five days later when counsel for the County was afforded an uninterrupted period of roughly three hours to challenge the good faith of Hill's counsel, to call opposing counsel a liar and unethical, to controvert the facts forming the basis for Hill's good faith belief of prejudice, to conduct a tirade against the defendants and their counsel, and to attempt to explain away the disqualifying comments made by Judge Bryson after presentation of the motion.[13/] (V. 102 at 15210-214, 15218-224, 15229-233, 15236-237, 15239, 15243, 15261-262, 15264-266, 15269, 15293-294). The following day, Judge Bryson issued his order denying disqualification, embracing several of the points presented by counsel for the County.

Judge Bryson's course of conduct after receiving the motion to disqualify was in and of itself disqualifying, irrespective of the legal sufficiency of the motion. *Bundy v. Rudd*, 366 So.2d 440 (Fla. 1978);

13/ On four, separately acknowledged occasions during his long, denunciatory speech, counsel for the County noted for the record that he had raised his voice. (V. 102 at 15222, 15224, 15234, 15236).

MacKenzie, 565 So.2d at 1339. His breach of every legal requirement in a disqualification setting is overwhelming.

1. Challenges to the accuracy of the factual allegations, evaluating his own subjective views rather than the perception of the client, and demonstrating hostility toward Hill's counsel.

Judge Bryson's first response to Hill's motion included a declaration that some of the factual matters contained in Hill's motion were "taken totally out of context," and would require him to go back and look at the testimony and transcript of eight or nine months of trial. (V. 101 at 15192). This was followed by the good samaritan parable which expressed his personal feelings of betrayal and dismay toward Hill and its counsel. *Id.* at 15193.

Perhaps personal disappointment and resentment can be explained away during a protracted trial, or even under the circumstances of Hill's presentation of the motion. But nothing can explain or justify Judge Bryson's comment, after twenty-four hours of reflection, that the motion contains not "lies" or "damn lies," but an even more damning form of untruth. Later at the same hearing Judge Bryson made clear that he believed he had the absolute right to challenge the factual foundation for a motion to disqualify if he knew facts to the contrary. (V. 102 at 15203-204). His belief was wrong. The rule in Florida is that facts alleged must be

taken as true, and the sole issue is the legal sufficiency of the motion in light of those facts.[14/]

Judge Bryson is condemned both by his record comments in response to the motion and by his formal order denying disqualification -- the latter adopting justifications and facts from the testimony of County counsel. In that order, he reiterated his view that some quotations in the motion were taken out of context and went on to state:

> *It is the view of the court*, however, that said conduct, as so reflected, does not exhibit any prejudice or bias . . . and, therefore, is legally insufficient toward disqualification.

(V. 24 at 3282) (emphasis added). Judge Bryson clearly applied an erroneous legal standard. The test is not whether Judge Bryson thought his conduct was prejudicial. The test is whether a lay person in the position of Hill reasonably believed that the conduct reflected bias.[15/]

14/ Even counsel for the County agreed with Hill and told Judge Bryson that the facts must be taken as true even if they are known not to be. (V. 102 at 15265-266).

15/ In his order denying disqualification, Judge Bryson reiterated his personal, subjective evaluation of his own attitude by declaring that he has not, had not and will not be prejudiced for or against any of the parties. (V. 24 at 3284). Again, even counsel for the County knew that the proper test for disqualification is not predicated on a trial judge's personal evaluation of his own fairness: [i]t's not for (continued...)

In his order denying disqualification, Judge Bryson made no bones about his pique with Hill's counsel. He reiterated (directly from the diatribe of County counsel) "that counsel for Hill deliberately contrived a means to attack the court's integrity . . . and that said conduct on the part of defense counsel was an attempt to goad the trial judge into making intemperate remarks [as a basis for disqualification]." *Id.* He acknowledged he made "intemperate remarks relevant to the good faith and ethics of [Hill's counsel]" after his twenty-four hour period of reflection following presentation of the motion, and he recounted his personal belief that the parties will receive a fair trial "despite any feelings which [he] might have had toward Mr. Schooley personally." *Id.* at 3284.

Judge Bryson capped his order with the legally unsound view that disqualification pertains only to bias or prejudice against parties, and not their lawyers. *Id.* Contrary to his view, however, both the Supreme Court and this court have said that prejudice or bias against counsel for a party *is* a basis for disqualification. *Livingston*, 441 So.2d at 1083; *Townsend*, 564 So.2d at 594.

15/(...continued)

you to judge whether you subjectively in your mind you [can provide a fair trial], but whether taking the facts as true, do these people have a well-founded belief that they are not going to get a fair trial?" (V. 102 at 15301).

2. Tirade on the record and testimony on the truth of the allegations.

With Judge Bryson's blessing, counsel for the County was permitted to conduct the tirade against Hill's counsel which Judge Bryson himself was barred from delivering. (V. 102 at 15210-313). It makes no legal difference that he used County counsel to accomplish indirectly that which could not be done directly, however. Tirades prompted by the acts of counsel are forbidden (*see McDermott*, 429 So.2d at 393), and the authorization for opposing counsel to testify in opposition to the facts alleged is disqualifying in and of itself.[16/] *Clark Auto Leasing & Rentals, Inc. v. Lupo*, 547 So.2d 1016 (Fla. 4th DCA 1989). The substance of County counsel's wrath was clearly adopted as his own in Judge Bryson's order denying disqualification, including challenges to the truth of the factual allegations in Hill's motion.

For example (although this list is not exhaustive), counsel for the County contested the motion's assertion that the trial was conducted at a leisurely pace over six months by testifying that the pace was in part dictated by Judge Bryson's poor health. (V. 102 at 15233-234; see also *Id.* at 15254). County counsel addressed the out-of-court discussions between Judge Bryson with persons favorable to the County's position in the lawsuit, testifying from personal knowledge that those

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16/ Counsel unabashedly expressed his intent to testify, as opposed to presenting legal argument. He declared more than once that counsel would be "making a record." (V. 102 at 15239-243, 10968). He even insisted that he wanted the judge to make "findings" (of fact). *Id.* at 15256.

conversations had nothing to do with the case. *Id.* at 15236. He testified to his personal view that Judge Bryson was a gentlemen, scholar and an understanding person, based on his personal experience with the judge in a prior matter. *Id.* at 15239. He addressed the allegation of a close personal relationship between himself and Judge Bryson, testifying as to the facts of that relationship. *Id.* He addressed a concern expressed in the disqualification motion regarding Judge Bryson leaving the bench for the testimony of one of Hill's witnesses, by testifying as to the circumstances that surrounded the occasion. *Id.* at 15285.

The Supreme Court's clear directive from *Livingston*, reiterated in *MacKenzie*, is that: "The legal sufficiency of the motion is purely a question of law." *MacKenzie*, 565 So.2d at 1335. A judge is not authorized to challenge or dispute the truth of the allegations in a motion to disqualify. Judge Bryson violated that simple standard and by so doing mandated his disqualification.

II. Hill is not liable to the Counts under any theory of law.[17/]

In its final judgment, the trial court found Hill liable to the County both for negligence and for breach of contract. Neither basis to impose liability is legally tenable. Notwithstanding recitations of fault in the final judgment, Hill breached no common law duty. Nor did Hill breach any contractual obligation to the County.

A. Hill has no tort liability to the County.

For several independent reasons, it was error for the trial court to find that Hill had a non-contractual duty to the County which was breached and caused damage.

1. Hill committed no tort independent of its contractual duties.

In Florida, a breach of contract, no matter how egregious, cannot give rise to a tort. *Lewis v. Guthartz*, 428 So.2d 222 (Fla. 1982). A tort action between

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17/ Without further elaboration here, Hill adopts the argument of Madison Management Group. Inc. With respect to the bar of the statute of limitations against County claims based on the County's *actual* knowledge of the use of class IV wire, the use of mortar coating, the use of Florida aggregates and that Interpace had not sent the County an "Affidavit and Certification of Compliance with AWWA C-301-72."

contracting parties may be brought only when a breach is attended by additional conduct which amounts to a separate, independent and distinct tort. *Id.*; *J. Allen, Inc. v. Humana of Florida, Inc.*, 571 So.2d 565 (Fla. 2d DCA 1990); *Electronic Security Systems Corp. v. Southern Bell Telephone and Telegraph Co.*, 482 So.2d 518 (Fla. 3d DCA 1986); *see AFM Corp. v. Southern Bell TelePhone and Telegraph Co.*, 515 So.2d 180 (Fla. 1987). In this case, the County neither pled nor proved conduct in addition to, distinguishable from, or independent of a breach of contract. Both the negligence and breach of contract counts against Hill are quite clear on this point. On the one hand, the negligence claim simply states that it is premised on conduct purportedly required by the contract:

> 66. The Defendant, CH2M HILL SOUTHEAST, INC., carelessly and negligently performed its duties owed to the Plaintiff, PINELLAS COUNTY, *under their contract* . . . in the following manner: . . .

(V. 8 at 972 ¶ 66) (emphasis added).

On the other hand, the breach of contract claim against Hill merely adopts and incorporates the allegations of the negligence count to state a breach of contract claim:

> The Defendant, CH2M HILL SOUTHEAST, INC., breached its contract with the Plaintiff, PINELLAS COUNTY, in the manner described in Paragraph 66.

Id. at 979 ¶ 70. No attempt was made to allege conduct that would give rise to a tort. *Id.* at 38-45.

The final judgment also confirmed that the County's negligence claim is predicated on the same conduct that underpins the contract claims

> The Court has also made findings of facts on several claims against CH2M Hill for breach of contract. In essence, Pinellas County has made the same claims against the engineer for negligently falling below the standard of care . . . as Pinellas County's representative in monitoring the construction of the pipeline.
>
> * * * * *
>
> The facts as found and the conclusions. . . . On [the] breach of contract actions . . . support the conclusion that CH2M Hill fell below the engineering standard of care many times. . . . Therefore, the County is entitled to replacement damages against CH2M Hill based upon the theory of negligence.

(R. 4137-38, 4142) (footnotes omitted).

The County's failure to allege or to prove conduct in addition to and separate and distinct from a breach of contract bars recovery in tort. *Lewis*, 428 So.2d at 223; *J. Allen, Inc.*, 571 So.2d at 566; *Electronic Security Systems Corp.*, 482 So.2d at 519; *see also AFM*

Corp., 515 So.2d at 181. Hill's motion for summary judgment on this point should have been granted. (V. 11 at 1363-65; V. 12 at 1590-97).

2. Hill had no statutory duties to the Counts.

Despite identification in the amended complaint that all of the duties Hill "negligently" breached were duties "under the contract," the trial court found that Hill had violated three duties that were independent of the contract: a failure to comply with Chapter 403 governing DER permits, a failure to comply with Chapter 471 governing regulation of professional engineers, and a failure to comply with AWWA specifications.[18/] (V. 8 at 972; R. at 4141-42). The purported breach of alleged statutory duties is nowhere, in any fashion, alleged in the amended complaint. The

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18/ The final judgment does not identify all of the statutory requirements that it finds Hill violated. (R. at 4441). The court 9 failure to identify all provisions purportedly violated is understandable since they were not alleged in the complaint. (V.8 at 935-55, 972-79). In a memorandum of law filed by the County on the issue of negligence, the County argued that Interpace and Hill had violated an independent duty by failing to comply with local health department permit requirements as required by sections 403.850-.864 of the Florida statutes and the administrative rules promulgated thereunder. (V. 11 at 1378 1413). Those provisions and rules regulate drinking water quality and according to the County, required Interpace to follow AWWA C-301, the standard which the final judgment concludes was not followed. Presumably, the court was referring to those same provisions in the judgment, although they are unidentified.

County's failure to allege these "independent" duties, of course, absolutely bars recovery for their purported violation. *E.g.*, *Porter v. Sprague*, 99 Fla. 371, 126 So. 759 (1930); *Freshwater v. Votter*, 511 So.2d 1114 (Fla. 2d DCA 1987); *Lee County Bank v. Winson*, 444 So.2d 459 (Fla. 2d DCA 1983), *rev. denied*, 451 So.2d 851 (Fla. 1984).

Even if the County had pled that Hill had negligently violated statutory "duties," there would still be no liability for at least two reasons. First, and most obviously, Hill's obligation to obtain a DER permit and to comply with that permit was not an independent duty; counsel for the County in fact elicited testimony that this was an obligation encompassed by the contract.[19/] (V. 97 at 14492-493).

Second, neither the statutory provisions governing DER permits (Chapter 403) nor those

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19/ Q. [By the County]: Do you have any recollection, as you sit there, of ever, ever, ever, filing, in compliance with this provision [of the DER/public health department's permit], a document, with the county health department, saying that you had inspected the protect, and it was complete for conformity to the plans and specifications, as approved?

A. Not that I recall.

Q. [By the County]: And that was your duty and responsibility under the contract with the county, was it not, sir?

A. *Yes*, sir.

(V. 97 at 14494) (emphasis added).

provisions regulating the licensure of professional engineers (Chapter 471) confer private rights of action on individuals or entities such as the County. Chapter 403, which governs drinking water quality, provides for the enforcement of DER permits *solely* by DER. *See* § 403.161, Fla. Stat. (1989) (creating liability *to the state*); § 403.121, Fla. Stat. (1989) (establishing judicial and administrative remedies for enforcement bs DER); § 403.131, Fla. Stat. (1989) (providing injunctive relief to DER); § 403.141, Fla. Stat. (1989) (creating civil liability *to the state* for violation of chapter 403). Chapter 471 creates a Board of Professional Engineers within the Department of Regulation and charges that board with responsibility for enforcement of Chapter 471. *See* §§ 471.007, 471.008, 471.031, 471.033, 471.035, Fla. Stat. (1989). Enforcement of section 471.025 -- the provision which the trial court concluded created an independent duty between Hill and the County -- is assigned exclusively to the Board of Professional Engineers through section 471.033.

Where the legislature has declined to create a private right of action, Florida courts are reluctant to imply such a right even where the complaining party appears to be in the class of persons whom the statute

was intended to protect.[20/] *Colonial Penn Communities, Inc. v. Crosles*, 443 So.2d 1030 (Fla. 5th DCA 1983), *rev. denied*, 450 So.2d 486 (Fla. 1984). Since the statutory provisions governing both DER permits and engineer licensure do not create any private rights running to individual citizens, any failure by Hill to comply with those statutory requirements could not, as a matter of law, violate an independent duty between Hill and the County that would support a negligence claim. As for the purported failure to apply appropriate standards to include AWWA standards where applicable, that too fails to rise to the level of an

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20/ Although no Florida decision has yet expressly detailed the criteria relevant to determining whether a private right of action should be implied, the United States Supreme Court has identified four relevant factors (only three of which would apply to a state court) for making such a determinations first, whether the plaintiff is one of the class for whose *especial* benefit the statute was enacted; second, whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; and third, whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1985).

All three tests are flunked in this case. Neither Chapter 403 nor Chapter 471 "especially" benefits, and neither creates a right in favor of private entities such as the County. There certainly is no indication that the legislature intended to create a private remedy in either of these chapters, and the remedy sought by the County does not aid the primary goal advanced by either Chapter 403 or 407. An award of damages to the County will neither affect the quality of the County's drinking water nor prevent an unqualified engineer from continuing to practice engineering.

independent duty which would support a tort claim.[21/] (R. 4141); *see Lewis*, 428 So.2d at 223; *J. Allen, Inc.*, 571 So.2d at 566; *Electronic Security Systems Corp.*, 482 So.2d at 519. The obligation to comply with AWWA standards (where applicable) was imposed by contract. (V. 128 at 10942 A3, E2; *Id.* at 19043 p. 15060-1, 2 [REV]; *Id.* at 19045).

3. The County Presented no proof of damages sufficient to support a tort recovery.

The County not only failed to plead and to prove tortious conduct separate and distinct from a breach of contract, it also failed to establish damages that would support a tort claim. Both this court and the Florida Supreme Court have held that a tort action cannot be brought to recover for so-called "economic losses," as opposed to personal injury or property damages.

> [T]he damages sustained by [a] tort must be of a particular kind. . . . '[W]ithout some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses.'

John Brown Automation, Inc. v. Nobles, 537 So.2d 614, 617 (Fla. 2d DCA 1988) (citation omitted), *rev. denied*, 547 So. 2d 1210 (Fla. 1989), *quoting, AFM Corp.*, 515

21/ The County consistently alleged that AWWA specifications were contract obligations. (V. 8 at 938, 943-57, 972-79).

So.2d at 180; *see also Westinghouse*, 510 So.2d at 899; *Strickland-Collins Construction v. Barnett Bank of Naples*, 545 So.2d 476 (Fla. 2d DCA 1989). A tort claim cannot be brought to recover for damage primarily to the product itself, as distinct from injury to a person or property.

The theory which bars economic loss recoveries is basic: manufacturers in a commercial setting have no duty in tort to prevent a product from harming itself. *Westinghouse*, 510 So.2d at 901. Where the gist of a claim is that a product failed to perform, causing damage to itself, the claim for relief sounds in contract and not in tort. *Id.*

These principles are equally applicable where there is minimal damage to supporting or surrounding property, incidental to the damage done to the product itself. In *Florida Power & Light Co. v. McGraw Edison Co.*, 696 F. Supp. 617 (S.D. Fla. 1988), *aff'd*, 875 F.2d 873 (11th Cir. 1989) (table), for example, a transformer exploded, destroying itself and causing damage to surrounding walls, curbing and adjacent pipes. Relying on the *Westinghouse* decision, the court concluded that those damages were minimal and not compensable in tort -- that is, they did not constitute sufficient damage to other property to remove the action from the policies and principles governing economic loss in contract actions.

Here, as in *Florida Power & Light*, the damage sustained was almost wholly to the product itself -- the pipeline. (V. 82 at 12160-161; V. 83 at 12178, 12181, 12286; V. 186 at 24288, 24291). There was no injury to any person. By law, the County's action was for

economic loss, i.e., damage to the pipeline itself, and the County was limited to recovery on its contract claim.

The principles underlying the economic loss rule apply in Florida no matter how suddenly a product damages itself. A so-called "calamitous event" exception which has been accepted in some jurisdictions was rejected by the Florida Supreme Court when, in its *Westinghouse* decision, the court approved *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). *See Westinghouse*, 510 So.2d at 902. The high court in that case both adopted the economic loss rule and rejected the calamitous event exception. *East River*, 476 U.S. at 870. The trial judge exceeded his authority when he accepted the County's contention that the suddenness of the one, in-service break in the pipeline exempted this action from the economic loss rule.

Nor was the trial court on-firm legal ground when it created out of thin air the notion that, as a matter of law, *Westinghouse* and *AFM* did not apply to contracts for the purchase of professional skill, judgment and expertise such as contracts with professional engineers. (R. at 4137; v. 12 at 1590-97). *Westinghouse* in fact turned in part upon a claim for negligent design of the nuclear-powered steam generators, and the plaintiff had specifically alleged a failure of professional expertise and skill:

> Florida Power & Light alleges that Westinghouse negligently *designed* and manufactured the steam generators, failed to provide proper operating instructions,

> and failed to warn of potential problems. Further, Florida Power & Light claims that Westinghouse knew that Florida Power & Light was relying on their proffered expertise in nuclear power and their conduct was the direct cause of Florida Power & Light's injuries.

Westinghouse, 510 So.2d at 900 (emphasis added). Despite these alleged breaches of professional skill, expertise and duty, the *Westinghouse* court held that no tort action would lie absent a claim for damages for personal injury, or damage to property outside the scope of the parties' contract.

AFM also addressed the professional services issue, and made no exception to the announced rule on tort claims for economic damages. In *AFM*, the court actually extended its earlier announced rule in *Westinghouse* to service contracts in general.

B. Hill is not liable for breach of contract.

The County's final judgment against Hill hinges on three alleged breaches of contract. For one thing, the court held that Hill had contracted to inspect the manufacture of pipe segments based on the County's contention that references to "contractor" and the "construction site" in the Hill Contract are not references to the pipeline installation process, but rather are references to the pipe segment manufacturing process. For another, the court held that Hill had contractual duties under the Interpace

Contract -- a document entered into between the County and Interpace nearly two years following execution of the Hill Contract -- based on a theory of document "merger." The court additionally ruled that Hill had breached its contractual design responsibilities by allowing Interpace's use of class IV wire for the pipeline, and by underdesigning the operating pressure for pipe segments. None of these bases for finding a contract breach is supportable in the record or in law.

1. Hill had no contractual duty to inspect the manufacture of Pipe segments.

The trial court's final judgment concludes that Hill was required as part of its Item A design duties to perform engineering services in connection with the process of manufacturing pipe segments. There is no such directive in Item A of the Hill Contract. The trial judge was persuaded that the terms "contractor" and "construction site" in the Hill Contract were references to the pipe segment manufacturing process, rather than to the pipeline installation process. A plain reading of that document belies that interpretation, however, and the context of its drafting and execution confirms that the language used could only mean the contrary.

The language in Item A of the Hill Contract makes clear that Hill's design functions encompass duties relevant to the design of the pipeline system, not the manufacture of the pipe segments. For example, Item A-1 anticipated that Hill would consult regarding "property, boundary, right of way, topographic and utility surveys," each patently relating to the location of

the pipeline. Consistently, Item A-3 called for Hill to draft specifications and schedules for the proposed improvements, meaning, of course, the pipeline system. (V. 128 at 19042).

References to "construction site" and "contractor" in Items A and B can only relate to installation of the pipeline. Item A-5 directs Hill to "advise prospective bidders, suppliers of construction materials, and equipment manufacturers." *Id.* at 19042. To "advise" *prospective* bidders, suppliers and equipment manufacturers could not have meant to inspect and oversee pipe segment manufacturing, for in 1975 when the Hill Contract was signed, there was no pipe segment manufacturer. None had even bid the job, let alone been selected to manufacture pipe segments.

In Item A-6, Hill was made responsible for "canvassing construction proposals, and [making] engineering recommendations in awarding of construction contract or contracts." *Id.* Use of the word "construction" in Item A-6 correlates with the identification of bidders, suppliers and manufacturers in Item A-5, relating to advisory services for *prospective* parties.

Just as plainly, Item B also identified services to be performed by Hill which related only to installation of the pipeline. All paragraphs in Item 8 discuss phases and features of procedures common to a contract between e consulting engineer on the one side, and an owner-general contractor on the other, such as visits to the construction site (Item B-1), preparation of routine change orders and stop work orders (Item B-4), recommendations regarding final acceptance of

construction work (Item B-6), and completion of a set of prints for each construction contract changed during the construction process (Item B-7). Significantly, the concluding, unnumbered paragraph of Item B provided that Hill's professional services during construction were *not* to include "the testing of materials or the furnishing of resident project representatives, field engineers, and inspection personnel." It is impossible to reconcile the installation-oversight duties of Hill with an obligation to control the manufacturing process when the contract expressly excluded materials testing and furnishing inspection personnel.[22/] Item C of the Hill Contract proves the point further. The first paragraph of Item C proposes that Hill would furnish "resident engineer" services "to observe the *construction* work of the *contractor* on a daily basis." (Emphasis added). These services were to have included:

> field observation, inspection of materials and work, . . . preparation of daily progress reports, monthly summaries . . . reviews, verifications and estimates for payments to contractors.

The County never authorized Hill to perform Item C services; instead, the County itself took direct responsibility for all "resident engineer" tasks. (V. 76 at 11484; V. 77 at 11279-280, 11308-309; V. 96 at 14249, 14256). The second paragraph of Item C calls for "on-site observations of the work and progress, and field

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22/ The very location of the Item B exclusion is in the midst of a discussion of "construction" duties and construction "contractor" related to the installation of pipeline, not the pipe segment manufacturer.

checks of materials and equipment." The "field checks" provision with regard to materials and equipment again confirm that Item C's discussion of "construction" related services is a discussion of matters to occur at the pipeline installation site, not a pipe manufacturing factory.

These plain readings of the language of the Hill Contract are bolstered by the context of its drafting. No one knew when the Hill Contract was signed in 1975 that the County would elect to save sales tax some two years later by contracting directly with a pipe supplier, rather than going through a general contractor. Indeed, the County's primary contract negotiator acknowledged that the Hill Contract was signed at a time when the County intended to use a single contractor both to purchase the pipe and to install the line. (V. 76 at 11177). Design phase supervisory services by Hill, which were completed before a pipe supplier was even selected, could not have plausibly been intended to include pipe manufacturing supervisory services.

The plain language of the Hill Contract is at odds with the County's contention, as adopted in the final judgment, that Hill's engineering services required supervision over pipe segment manufacture. It was error for the judge to conclude that Hill breached a contractual duty to perform pipe segment manufacture-related duties.

2. Hill could not be held to a contractual duty under the County's contract with Interpace through the legal fiction of a "merger" of two separate documents.

A second basis for finding Hill in breach is the final judgment's legal fiction of "merger" of the Hill Contract with the Interpace Contract.[23/] Hill was not a signatory to the Interpace agreement. The latter was signed almost two years after Hill's contract. Not one case is identified in the final judgment for the proposition that a non-signatory to a contract is obligated to perform duties identified within that contract, let alone when the two documents are not contemporaneous. The County argued its theory of contract merger -- in order to bind Hill to the terms in the Interpace Contract -- by invoking two doctrines of judicial construction: *"in pari materia* and "construction against the drafter." Neither legal theory has any sound or legitimate application to this circumstance.

Not surprisingly, the final judgment does not rely on any case in which the *in pari materia* doctrine was utilized in a like circumstance. Its sole reliance is on *Standard Newspapers, Inc. v. Woods*, 110 So.2d 397 (Fla. 1959), where a second, contemporaneous and interdependent contract was signed because the first would not have been entered without the other. Under these circumstances, the court construed the second

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23/ This fall-back thesis inherently acknowledges that the Hill Contract, standing alone, could not support liability for manufacturing-related duties.

contract as being *in pari materia* with the first. Quite clearly, there is no similarity between the *Woods* situation and this one. Unlike *Woods*, Hill did not benefit from the Interpace Contract. Unlike *Woods*, the Interpace Contract was not contemporaneous in time with the Hill Contract. Unlike *Woods*, the 1975 Hill Contract was not contingent on the 1977 Interpace Contract. The trial court's acceptance of the County's second doctrine of judicial construction -- construing agreements against the drafter -- is equally far afield. That doctrine applies only where a signatory to an agreement has drafted the document. The doctrine has never been applied in Florida to impose duties on a non-party. Again, the cases identified in the final judgment reflect a very different situation -- the typical circumstance of construing a contract against the signator-drafter.[24/]

The importation of a "merger" doctrine into this case is ludicrous. As stated in *In re: Estate of Samuel Donner*, 364 So.2d 742 (Fla. 3d DCA 1978):

> Ordinarily, a contract cannot bind one who is not a party thereto since to create a valid contract there must be reciprocal assent to a certain and definite proposition.

(Citations omitted); *see also Ogden v. Groves*, 241 So.2d 756 (Fla. 1st DCA 1970). Likewise, in *Jenkins v. City*

24/ *Sol Walker & Co. v. Seaboard Coast Line R.R. Co.*, 362 So.2d 45 (Fla. 2d DCA 1978); *Bouden v. Walker*, 266 So.2d 353 (Fla. 2d DCA 1972); *Allegheny Mutual Casualty Co. v. State*, 176 So.2d 362 (Fla. 2d DCA 1965).

Ice & Fuel Co., 118 Fla. 795, 160 So. 215, 217 (Fla. 1935), the court recognized that

> A third party is not liable as a rule upon a contract, express or implied, unless he was one of the immediate parties to the agreement or has become a party to it by subsequent agreement with the original parties.

The trial court's conclusion -- that the identification of engineering duties in the Interpace Contract bound Hill to perform those duties -- should be compared with the reasoning in *Lawrence v. United States*, 378 F.2d 452, 461-62 (5th Cir. 1967):

> A person is not made a party to a contract merely by being named and described in it or merely by the fact that such a contract is referred to in a second instrument in a way to evidence that such person is a party in another contract. This is especially true if the parties are different, are not identical, or there is an absence of one or more significant elements of identity.

(Footnotes omitted).

The Florida Supreme Court recently demonstrated the narrow circumstances which must pertain to tie together and merge two distinct contracts. *OBS Company, Inc. v. Pace Construction Corp.*, 558 So.2d 404 (Fla. 1990), involved a lawsuit between subcontractor (OBS) and general contractor (Pace).

Pace alone was in direct contractual relationship with the owner. OBS had only a direct contractual relationship with Pace. When OBS sued, Pace defended by asserting it had not been paid by the owner, and therefore it should not have to pay OBS.

Because OBS' agreement with Pace contained a provision which expressly incorporated the agreement between the owner and Pace as part of the Pace contract with OBS, the court was able to link the two agreements and require Pace (as signatory to both contracts) to pay OBS. There is a complete absence of any comparable incorporation by reference in this case. The only common signatory to the contracts here was the County, not Hill.

A case factually akin to this one is *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tx. 1982). In *Johnson*, a non-party architect/engineer was charged with a breach of a contract between the construction contractor and the owner, based on the allegation that the non-party engineer had assumed the obligations specifically assigned to it in that owner-contractor contract. The court rejected the attempted use of the contractor-owner's contract as a basis to impose liability on the architect/engineer, finding it to be unheard of and without legal support. The court lucidly explained that the substantive law on breach of contract exists because of the societal interest in having a person perform his promises, whether express or implied, so that actions for breach of contract "are inherently possible against promisors only." 630 S.W.2d at 369. While duties for the engineer may have been expressed in a contract to which it was not a party, due to the fact

it "was not in legal contemplation a party to the contract, it owed no contract-based duty to [the contractor]."[25/] 630 S.W.2d at 370. The artificiality of the court's "merger" theory is exposed more vividly by reviewing the language of the Interpace Contract, to which Hill was not a party. That 1977 contract defined Interpace as "supplier," not the unnamed "contractor" in the 1975 Hill Contract.[26/] The terms of the Interpace Contract, moreover, were all keyed to engineering services relative to post-manufacture activities when pipe segments were delivered to the installation site. For example, section C-03(a) of the Interpace Contract provided that

> All materials furnished, when not in accordance with the intent of the Plans and Specifications, will be rejected *and shall be removed immediately* and replaced by suitable and satisfactory materials. . . .

(V. 8 at 994 C-2) (emphasis added). This language deals with the *removal* of pipe segments brought to the

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25/ *Haddad v. Bagwell*, 317 S.W.2d 781 (Tx. 1958), is a similar case involving an owner's claim against an architect where the owner's contract was solely with a contractor. That case had the some outcome. The court held that the architect was entitled to summary judgment in the owner's suit since he was not an immediate party to the contract, not one for whose benefit it was made, and not in privity.

26/ In fact, the term "constructing" in the definition of "supplier" is expressly said to pertain "for purposes of *this* Contract" [meaning the Interpace Contract]. A logical correlation of the two contracts would identify Interpace as the "materials supplier" or the "equipment manufacturer" mentioned in the Hill Contract.

installation site for failure to meet design drawings, plans and specifications.

Section C-03(a-1) authorizes the owner to stop supply of the pipe "[i]f the supplier fails to *remove* any defective materials . . ." (emphasis added), plainly relating to delivered or installed pipes which proved to be defective and were to be removed from the system. Section C-03(b) places the burden on Interpace, as the supplier, to confirm with the engineer through independent testing that the pipe segments have passed tests prior to delivery, and section G provides that Interpace, as supplier, has agreed "to permit a representative of the county, and/or its engineer . . . to inspect the work in progress. . . ." (V. 8 at 1020 G-3 ¶ 6). Interestingly, this latter section, which *does* specifically relate to the manufacturing site, provides only a right, not a duty of inspection at the manufacturing plant.[27/]

Finally, if the terms of these respective contracts were doubtful as to the absence of any contractual duty on Hill, and if there were a doctrine of merger in a case such as this, the performance of the parties in relation to the provisions of the contracts removes any possible view of the contracts as requiring Hill to inspect the

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27/ The County in fact inspected the manufacturing plant repeatedly. (V. 96 at 14229-231, 14245-246, 14257-259, 14281). Section G-3 in the Interpace Contract also belies the interpretation given the provision of Hill's contract which called for four monthly visits to the "construction site." Were those four visits actually meant to be to the factory, then Hill's mere option to visit the factory, as contained within the Interpace Contract, would have been meaningless.

pipe manufacture plant.[28/] The County was designated as the recipient of any testing data to be provided by the manufacturer. (V. 8 at 981; V. 128 at 19043 p. 1010-3, 15060-2 [REV]). If the County desired additional laboratory testing of the manufactured pipe segments and desired that testing be done by Hill, the County was required to request those services specifically under Item D of the Hill contract. The County never did this.[29/]

In point of fact, the County had obtained tests of components of pipe samples from Interpace's Lacoochee pipe manufacturing plant, and County employees visited the Lacoochee pipe plant several times. (V. 96 at 14229-231, 14245-246, 14257-259, 14281). The County even suspected that the aggregate used to manufacture the concrete coating of the pipe was inadequate. (V. 84 at 12412-413).

The Hill Contract and the Interpace Contract are not legally or factually susceptible of merger, and the parties' course of performance directs a conclusion to the contrary because the County reserved to itself and in fact performed all "resident engineering" duties. The

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28/ The final judgment wrongly concludes that if Hill was not performing duties related to resident engineering at the pipeline, then no one was performing those duties. The County had itself assumed these resident engineering and inspection services. (V. 96 at 14255-256).

29/ Neither the Hill Contract nor the Interpace Contract imposed a materials testing obligation on Hill. This was Interpace's obligation primarily, with an adjunct responsibility of the County to obtain further materials testing if it deemed necessary. (V. 8 at 995).

trial judge's conclusion (acting through the County's mind and pen) that only Hill was available to protect the County, is nowhere supported in the record or in law.

3. Hill's pipeline design was free of defects.

a. Hill did not breach its contract in relation to Interpace's use of class IV wire in pipe segments.

The trial court's final judgment found that Hill breached its contract by allowing Interpace to use class IV wire. Class IV wire was appropriate under the standards in existence at the time, however. The trial court has applied 1909 opinion testimony to interpret a 1977 contract, notwithstanding that Class IV wire conformed with AWWA C-301 standards when the Interpace Contract was made. When Interpace contracted with the County to provide manufactured pipe segments, it agreed that segments would comply with AWWA C-301 standards, and Interpace in fact submitted shop drawings which specified that the pipe segments would be manufactured in accordance with AWWA specification C-301-72. (V. 128 at 19045). That standard specifies wire conforming to ASTM Designation A-227, but also provides that

> wire with specified minimum tensile strengths exceeding those in A-227, class II, may be used if the wire meets the other requirements for class II in that

> specification, and the pipe design may be based on those higher strengths.

(V. 128 at 19041). By definition, class IV wire has a higher minimum tensile strength than class II wire, and it can be manufactured to meet all the other requirements for class II set forth in A-227. (V. 112 at 16858-859, 16863, 16868-869; V. 248 at 28040 pp. 156-69).

The chairman of the committee which authored AWWA C-301 in 1972 ("C-301-72"), Walter Neubauer, testified that class IV wire was plainly allowed and contemplated as a product meeting AWWA C-301-72. (V. 112 at 16835-920). Two other individuals who sat on the standards committee agreed that class IV wire could be used under that standard. (V. 93 at 13749, 13767, 13772, 13792-796). That fact was even acknowledged by the County's own expert, John Kiefer, and County experts who had tested the class IV wire used in pipe segments on this project found that it passed all specific A-227 test requirements. (V. 99 at 14738 pp. 156-59 and see this brief at p. 9, line 1-2).

Nonetheless, at trial the County arrayed a chorus of so-called expert voices consisting of engineers and metallurgists, none of whom ever sat on or participated in the work of the standards committee, who took a different view of AWWA C-301-72. This group contended from their 1989 vantage point that the standard should be read to permit tensile strengths exceeding the class II minimum, but only within the class II tensile range. (V. 39 at 5923-25 V. 46 at 6894, 6945-46; V. 50 at 7445-46; V. 60 at 8843; V. 168 at 21835 pp. 106-07, 116). This interpretation, of course,

would make C-301-72 wholly redundant with A-227, which *already* allowed for use of wire with tensile strengths inclusive of the class II maximum.

There was no testimonial dispute at trial among standards experts on the acceptability of class IV wire. The testimony of County witnesses who found a different meaning in the language some 17 years after it was written does not detract one whit from the fact that a reasonable design engineer in 1977 would readily have approved the use of class IV wire as being in compliance with C-301-72. Their disagreement as to what the standard would allow suggests, at best, an ambiguity in its wording. But any engineer in 1977 who believed there was ambiguity in C-301-72 and been concerned on receipt of Interpace's submittal sheet identifying its intention to use class IV wire, logically would first have contacted the drafting committee of the standard to inquire regarding the committee's intent. The uniform testimony at trial shows the answer they would have received class IV was perfectly proper under AWWA C-301-72. Hence, it was clearly reasonable for Hill to have accepted Interpace's selection of class IV wire in 1977.[30/] (V. 112 at 16858-861).

The trial court's conclusion that class IV wire was not authorized for this pipeline is also legally defective. It contradicts the prohibition in Florida law against a court's reinterpretation of contract language which is otherwise clear and unambiguous. *See*

30/ Interestingly, the County's own engineer, Mike Flanery, used the *same specifications* both before and after this project and allowed the use of class IV wire. (V. 84 at 12471-476).

Hamilton Construction Co. v. Board of Public Construction, 65 So.2d 729 (Fla. 1983); *Paddock v. Bay Concrete Industries, Inc.*, 154 So.2d 313 (Fla. 2d DCA 1963). It makes Hill, in its role as design engineer, a guarantor of the proper manufacture of pipe by Interpace, contrary to Florida law that a design professional's obligations do not include the guarantee of a perfect plan or a satisfactory result. *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (Fla. 1918). A design professional is obliged only to perform contractual duties in accordance with the professional "standard of care used by similar professionals in the community under similar circumstances." *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd.*, 552 So.2d 228, 232 (Fla. 5th DCA 1989), *rev. denied., sub nom., Anderson v. Willingham Realgrowth Investment Fund, Ltd.*, 563 So.2d 631 (Fla. 1990); *see also Ahimsa Technic, Inc. v. Lighthouse Shores Town homes Development Co., Inc.*, 543 So.2d 422 (Fla. 5th DCA 1989). The evidence was overwhelming that the specifications drafted by Hill and ultimately utilized by the County and Interpace as part of the Interpace Contract, including those for class IV wire, were well within the standard of professional care owed by a design engineer in its contractual relationships.[31/]

31/ If accepted, the guarantee theory of the trial court would usher in an age of unlimited liability for all engineers or architects submitting design plans to be administered by contractors and others. This very concern was acknowledged in *E.C. Goldman, Inc. v. A/R/C Associates, Inc.*, 543 So.2d 1268 (Fla. 5th DCA), *rev. denied*, 551 So.2d 461 (Fla. 1989), as one which would curtail the entire profession of consulting services, contrary to the public

(continued...)

b. Hill did not breach its contract in relation to pipeline pressure.

The County's ghost-written final judgment hints that Hill breached a contractual duty by failing to design a pipeline for operation at 150 psi. This is another baseless conclusion.[32] The Hill Contract incorporated the design assumptions of the County's Master Plan, which called for 100 psi operating pressures only.[33] In any event, Hill specified (and in turn Interpace manufactured) pipe segments in fact designed to operate at 150 psi, with a protective surge component to 210 psi. (V. 128 at 19043 pp. 15060-1 [REV]; *Id.* at 19045). The County consistently has operated the pipeline at or below 100 psi anyhow. (V. 83 at 12238-240, 12246, 12293).

31/ (...continued)
policy of this state. The engineer or architect would be cast as responsible party for the defect-free functioning of numerous components manufactured by different companies located in different places across the country.

32/ The County's evidence on this point is not a breach of a 1975 contract which called for 100 psi pressures, but rather the speculation that pressures to 150 psi may be required at some time in the future. (V. 83 at 12236-239; V. 84 at 12388, 12499-501).

33/ Other components of the pipeline such as meters, not just the pipe segments, were also designed to operate below 150 psi. (V. 42 at 27704, 27705; V. 99 at 14786). This integrated pipeline project was never conceived by Hill or the County to *operate* at 150 psi, whatever operating pressure over 100 psi the pipe segments may have been manufactured to withstand.

III. The trial court exceeded its authority in awarding the damages equal to the cost of replacing the entire pipeline with improved components.

The trial court concluded that each and every one of the 3,400 pipe segments manufactured by Interpace contained manufacturing defects so as to warrant immediate replacement of the entire 13.5 mile pipeline. Hill, the design engineer which was paid $365,000 for its services, was ordered to pay $17,800,000 as a replacement cost, plus another $1,447,832 for structural improvements to the pipeline. Those awards are erroneous on a number of bases, each alone mandating reversal.

A. The trial judge improperly held Hill liable for replacement of the entire pipeline.

The replacement award of $17.8 million against Hill is predicated on the trial court's conclusion that each and every pipe segment in the entire pipeline contained five "manufacturing defects": (1) mortar coating that is too porous; (2) insufficient slurry encasing the wire wrapped around each pipe core; (3) improperly cured cement cores; (4) improper materials (aggregates) used in core manufacture; and (5) defective wire used to wrap each pipe core. (R. at 4008-9; *see also* R. at 4010-62, 4083). Hill had no

connection whatsoever to the first four of these alleged defects.[34/] (Hill Init. Brief at IIB).

An award of full replacement cost because Hill approved the use of class IV wire for the pipe segments is preposterous. For one thing, Hill neither participated in the design nor in the manufacture of that wire, which took place in a facility located in Solon, Ohio, far from where the pipe segments were fabricated. For another, *any* replacement cost award is simply untenable on this record. At best the County proved entitlement for pipeline *repair* damage.

The predicate for every damage award, whether sounding in contract or in tort, is to provide fair and just compensation commensurate with the actual harm occasioned by the breach or tort. *Hanna v. Martin*, 49 So.2d 585 (Fla. 1950); *Bank of Miami Beach v. Newman*, 163 So.2d 333 (Fla. 3d DCA 1964). Damages may only be awarded where actual harm resulting from a breach or tort can be demonstrated with reasonable certainty. *Saporito v. Bone*, 195 So.2d 244 (Fla. 2d DCA 1967) (the rule of reasonable certainty is applicable to establishing the existence of injury or harm as well as to the amount or extent of the loss); *see also E.F.K. Collins Corp. v. S.M.M.G., Inc.*, 464 So.2d 214 (Fla. 3d DCA 1985). Plaintiff bears the burden of establishing both actual loss or harm arising from a breach or tort and the extent of that loss measured in money. *Saporito*,

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34/ Interpace alone chose the materials for manufacture of its pipe cores, and was solely responsible for curing the cores after manufacture. Hill also played no role in the application of slurry to the cores and wires or in the mixing and application of mortar to the pipe. *Id.*

195 So.2d at 245; *United Steel & Strip Corp. v. Monex Corp.*, 310 So.2d 339 (Fla. 3d DCA 1975). The County failed to carry its dual burden. Indeed, it knowingly and intentionally made no attempt to do so.

The County claimed, and the final judgment echoed, that under the terms of the County's contracts with Hill and Interpace, the County had contracted to obtain a pipeline that would transport water to meet its community needs for at least 100 years. (V. 8 at 957, 960, 978; R. at 3979, 3988-91). It was undisputed at trial that the County's pipeline had in fact transported water that met the County's needs for at least twelve years. (R. at 4164; *e.g.*, V. 72 at 10708; V. 73 at 10832-836). The County contended, however, that the pipeline was so riddled with defects that the County was entitled to have the entire pipeline replaced, and that full replacement must be made "immediately." (V. 8 at 959-64, 968-69, 979).

The County spent considerable money and time at trial attempting to establish the existence of alleged manufacturing defects. (V. 33-45, 101, 121; V. 41 at 6172-6325; V. 67-73). In contrast, it refused to present any evidence whatsoever to establish the need for immediate replacement, relying instead on a claim that another rupture *might* cause public injury or harm. (V. 70 at 10404-405; V. 72 at 10702-709; V. 73 at 10833-834). The trial court accepted the County's imminent harm theory without requiring proof that any harm or injury had ever occurred or was reasonably

likely to occur, not even from the one and only rupture in 1979.[35] (R. at 4050, 4151, 4164).

The County's inability to prove harm, and indeed its refusal to even attempt to do so, is understandable. By the time final judgment was entered, the pipeline (alleged defects and all) had been operating on a daily basis for twelve years, with the exception of one in-service break in 1979 and one rupture in 1980 during a pressure test performed for the specific purpose of identifying problem pipe segments.[36] (V. 35 at 5215-20; V. 73 at 10831-834). Consequently, at the time of trial, the County had sustained no injury or loss from Hill's or Interpace is purported breach of contract, other than repair costs relating to those two failures.

Unfounded speculation of possible future harm to the public, needless to say, provides no substitute for competent, substantial evidence of the pipeline's remaining useful life (the County's real alleged "harm"), and no legal basis for immediate replacement of entire line. In *Adler v. Seligman*, 438 So.2d 1063, 1066 (Fla. 4th DCA 1983), the court reversed an award of damages to reconstruct 42 stairwells where there had been no showing of harm.

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[35] The County made no effort whatsoever to show the probability of a rupture in the future, or of the reasonable probability of replacing the entire pipeline in the next 88 years. In fact, the County knowingly elected not to undertake studies necessary to ascertain the future life of the pipeline. (V. 70 at 10405-406; V. 72 at 10702-709).

[36] The County conducted two additional pressure tests in 1982 and 1985, and sustained no failures during either test. (V. 43 at 6499-501; V. 221 at 27162).

> The damages here were improper because they did not involve actual damages to Seligman, but instead were in the nature of damages for repairs which *might occur in the future*. On retrial, Seligman shall be entitled to recover future damages *only if it can be* shown that the repairs will necessarily occur and that Seligman will be responsible for them.

(Emphasis added); *see also Hanna*, 49 So.2d at 587; *Saporito*, 195 So.2d 245; *E.F.K. Collins Corp.*, 464 So.2d at 214; *Bank of Miami Beach*, 163 So.2d at 333.

Although the County was entitled to no award beyond repair damages, the final judgment holds that the County was entitled to replace the entire 13.5 mile pipeline for $17.8 million because there was a possibility of harm to the public from future ruptures. (R. at 3987, 4009, 4016, 4020, 4050, 4151). That finding is insufficient as a matter of law to support an award of damages, let alone a replacement cost award, in the absence of any evidence whatsoever that the pipeline would no longer deliver water as it had for the past twelve years.[37] *Id.*

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[37] The County introduced no competent substantial evidence to establish that the pipeline will incur another rupture during its alleged remaining 88-year life, or that there is any likelihood that a rupture during those 88 years will inflict injuries on any member of the public. The totality of competent evidence on this point is to the contrary. Dr. Jerrell Thomas, an aerospace engineer who had worked as a NASA engineer on the Redstone and Jupiter missiles, on Saturn I and V, the Lunar Rover, Apollo-Soyuz, and the

(continued...)

The County's contract with Hill does not guarantee a flawless, failure-proof pipeline. *See Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (1918); *Lochrane Engineering, Inc.*, 552 So.2d at 228. Neither Interpace nor Hill guaranteed a pipeline that would never sustain a disruption or failure in 100 years.[38] *Id.* The failure of one or more pipe segments, or even the prospect of other such failures over the prospective life of the pipeline, does not entitle the County to replace the entire pipeline. *Id.*; *Adler*, 438 So.2d at 1066.

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[37] (...continued)

space shuttle, was qualified as an expert in stress analysis of complex structures, in reliability modeling, and in reliability and risk analysis. (V. 119 at 17660, 17763, 17666, 17668-671, 17704; V. 237 at 27635). Based on studies he had performed on this very pipeline, and using the County's hypothesis of an original life for the pipeline of 100 years, he testified that the annual probability of another rupture in this pipeline between the years 1989 and 1994 was one in a million. (V. 119 st 17770-772, 17718-720; 17828). He also testified that the annual probability of a rupture in this system from 1994 to the year 2078 (the remainder of the alleged 100-year life span for the pipeline) was 4 in 10,000 -- that is, a 97% probability that this pipeline would not experience another rupture at any time from the date of trial until 2078, the end of its alleged contract lifetime. *Id.* He compared the risk of a fatality from a rupture to the risk of a workman fatality during replacement of the pipeline, and concluded that the risk of a workman fatality during replacement of the line far exceeded the risk of a fatality from a future rupture. *Id.*; (V. 12 at 17889-890).

[38] One of the County's expert witnesses verified that this structure was subject to natural deterioration over time. (V. 123 at 18400, 18402-403).

In *Grossman Holdings, Ltd. v. Hourihan*, 414 So.2d 1037 (Fla. 1982), the Court adopted section 346(1)(a) of the Restatement (First) of Contracts, which might have entitled the County to immediate replacement of all 3,400 pipe segments in the 13.5 miles of pipeline if, and only if, the County had proved that the entire pipeline was worthless or dysfunctional. (Such proof would not have been possible, of course, given the County's continuous use of the line). Corbin notes that even section 346(1)(a), however, does not permit replacement cost if replacement will result in unreasonable economic waste:

> For a breach by defective construction . . . the injured party can get a judgment for damages measured by the reasonable cost of reconstruction . . . in accordance with the contract, if it is possible and does not involve unreasonable economic waste. Sometimes the defects in a structure cannot be physically remedied without tearing down and rebuilding. In many such cases, the structure as it exists, even though it is not exactly in accordance with the contract requirements, is such that it will render substantially all of the service that the structure contracted for would have rendered; and reconstruction and completion in accordance with the contract may be possible only at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method involving such economic waste.

5 A. Corbin, *Corbin on Contracts*, § 1089 (1964) (footnotes omitted).

In order to avoid the economic waste doctrine, the County was obliged to establish that the pipeline was no longer capable of rendering substantially all of the service that the County contracted to receive. The County in no wise satisfied this condition.[39/]

The most compelling evidence on the issue of damages came from the County's own expert witness, who testified that the pipeline in fact had a service life beyond the date of trial. (V. 72 at 10711). That testimony, combined with the County's admission that it could have ascertained the remaining service life of this pipeline but chose not to, confirms that the County did not establish the element of harm necessary to recover an immediate (or indeed any other) replacement award.[40/] (V. 70 at 10404-406).

39/ Under subsection (ii) of Restatement section 346(a)(1), the County might have sought damages in an amount equal to the difference between the value of the structure contracted for and the value of the structure received. Restatement (First) of Contracts § 346(1)(a)(ii)(1932). Since the pipeline had performed exactly as contracted for, no damage award under this provision was possible.

40/ Even the amount of that award is inaccurate. The $17,106,715 replacement award is overstated by over $700,000, based on the known cost for replacement pipe segments. (V. 113 at 16931-933, 16944-445, 16959, 16960-511; V. 206 at 26625, 26627). This overstatement is over and above those replacement overcharges detailed in Madison Management Group, Inc.'s brief, which equally apply to the replacement award against Hill.

B. The trial judge improperly awarded "betterment" damages.

The court awarded $783,388 to the County to compensate for the cost of upgrading the original pipeline with an epoxy coating, and $664,444 to redo the original (and already paid for) pipeline design. (R. at 4119, 4158-61; V. 206 at 26627). Although these amounts may appear insignificant in the context of a $19.8 million award, they are large dollar amounts and typify the bias which pervades every aspect of this case.

It is axiomatic that, when neither the specifications nor design are deficient for the original intended purpose, there can be no damage award beyond the cost of restoring the structure to its original design. *Grossman v. Sea Air Towers, Ltd.*, 513 So.2d 686 (Fla. 3d DCA 1987), *rev. denied*, 520 So.2d 584 (Fla. 1988); *see also Temple Beth Sholom v. Thyne Construction Corp.*, 399 So.2d 525 (Fla. 2d DCA 1981) (an owner's recovery for correction of design defects is limited to the reasonable cost of repair or replacement according to the original design) *Barile Excavating & Pipeline Co., Inc. v. Kendall Properties, Inc.*, 462 So.2d 1129 (Fla. 4th DCA 1984). If an owner decides during the course of replacement or repair to adopt a more expensive design, the additional expenses incurred for such "betterments" are chargeable solely to the owner. *Id.* These controlling principles come into play even more dramatically in relation to an award for replacement pipe having an epoxy coating -- one that was not specified in the original pipeline contract.

The court awarded over $780,000 for an epoxy coating of the new line. Even the ubiquitous Robert

Edmunds, the County's chief expert witness, had to acknowledge that Hill did *not* breach any contractual or professional duty by failing to require epoxy coating of the original pipeline:

> Q.: . . . In view of what you've told us about the soils and groundwater, do you have an opinion as to whether or not [Hill] should have specified a coating, an epoxy coating or the like, for the pipe in this pipeline.
>
> * * * * *
>
> A.: . . . I think, *although not strictly required*, it would have been prudent to provide the coating. . . .
>
> Q.: [On cross-examination] And you would have put one on in 1977, as part of the specifications . . . ?
>
> A.: *Not absolutely. I think that it is not a clear-cut decision as to whether to do it or not.*

(V. 37 at 5559-60, 5923) (emphasis added).

The County-authored final judgment extensively relies on Mr. Edmunds' expert opinions on virtually every aspect of the design and manufacture of the pipe segments used in this pipeline. (R. at pp. 4008, 4010-18, 4020-22, 4030-34, 4038-39, 4043-45, 4047-52, 4059-60). It conveniently ignores his testimony on this point, however, in favor of the testimony of one of the

County's other experts, Robert Price. (R. at 4117). Mr. Edmunds felt that the existence of carbon dioxide in the groundwater did not require epoxy coating; Mr. Price was of the opinion that it did. (V. 37 at 5560; V. 71 at 10446). Mr. Edmunds felt it was essential to have both a low soil Ph and a total high acidity to have an aggressive environment which would require epoxy coating; Price disagreed. (V. 41 at 6179; V. 73 at 10758-759). Mr. Edmunds testified that Hill did not fall below the standard of care in failing to recommend epoxy coating in 1977; Mr. Price again disagreed. (V. 41 at 6181-82; V. 43 at 6553-85; V. 71 at 10445-448). Although Edmunds and Price were in lockstep on virtually every aspect of the design and manufacture of the component parts of this pipeline, they could not agree that there was an obligation to coat this pipeline in the first instance. Patently, the County failed to establish with any degree of certainty that the applicable standard of care in 1975 required such a coating.

Even if Hill should have specified an epoxy coating, it cannot be held responsible for paying what would have been the owner's cost had there been no breach in the first place. *See Sea Air Towers, Ltd.*, 513 So.2d at 686, in which an architect and engineers were held to have no liability for the upgrade of a condominium garage deck because the financial responsibility for increasing the load capacity would have fallen on the owners irrespective of any negligence by the architect and engineers. *See also Lochrane Engineering, Inc.*, 552 So.2d at 228. Here, as in *Sea Air Towers, Ltd.*, the cost of upgrading (to epoxy coating) would have belonged to the County, irrespective of any

breach. Had Hill specified an epoxy coating in 1977, the County would have paid for it, not Hill.

The final judgment casts responsibility on Hill to pay the additional costs of coating its new pipeline -- the alleged difference between the cost of coating the original pipeline estimated as of 1977 ($1,596,232) and the current cost of coating a new pipeline ($2,379,620) (R. at 4159-60; V. 206 at 26627). This award is nonsensical. The County never spent $1,596,232 to coat the original pipeline. Since it had the use and benefit of that money since 1977, Hill is entitled to offset this saving (rather than being required to foot any increase in cost). At statutory interest rates, the County benefit (based on its estimates) was $1,768,275-19. At the conservative rate of 6%, the County benefitted by $1,007,839.99. Since both amounts exceed the $783,388 "additional cost" to coat the pipe, the County was entitled to no award to epoxy coat its new pipeline. 22 Am. Jur. 2d *Damages* ¶ 552 (1988).

For the same reasons, there is no legitimate basis to award $664,444 against Hill for design of the new pipeline. (R. at 4161; V. 206 at 26627). This amount was derived by recalculating the original design and consulting costs ($365,000) to present dollar value. (V. 86 at 12897-900). As there was no showing that the design provided by Hill in 1977 was wholly inadequate, there is no support for requiring Hill to reimburse the County every single cent Hill was paid for designing the pipeline in 1977 ($365,000) at the current value of that money ($664,444). The County got what it bargained for, and it is not now entitled to have Hill reimburse its original design fee ($365,000) at current or any other rates.

These two betterment awards, totalling $1,447,832, are factually and legally unsupportable. They reflect an overreaching which only an advocate-drafted final judgment would present.[41/]

Conclusion

It is regrettable that a trial of this length must be set aside for judicial misconduct. The rules of law unmistakably require that result, however. Judge Bryson's demonstrated bias in favor of the County and against Hill (both directly and through its counsel), aggravated by his conduct after being presented with the motion to disqualify, leave no room to salvage this protracted bench trial.

Even if there had been no disqualifying conduct by the presiding judge, however, the judgment entered by the trial court cannot be sustained. The County-crafted final judgment is premised on (i) liability for torts which were neither pled nor proved, (ii) liability for breaches of one contract to which Hill was not a party and another which was fully performed within the realm of services contracted for, and (iii) damage awards which are wildly speculative and without legal foundation. Judge Bryson's entry of the extraordinary final judgment submitted by the County departs so dramatically from the established legal principles in Florida that the only plausible explanation for its entry is the trial court's predilection to give the County everything it requested.

41/ *See Waldman v. Waldman*, 520 So.2d 87, 88 n.4. (Fla. 3d DCA), *rev. denied*, 531 So.2d 169 (Fla.1988).

The court is respectfully requested to vacate the final judgment as being unsupported in law or in fact, and to remand this case with directions to enter judgment for Hill. Were the court to conclude otherwise, at a minimum a new trial must be ordered before a judge other than Judge Bryson.

Respectfully submitted,

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Certificate of Service

I certify that a correct copy of appellant's initial brief and appendix initially were mailed on March 25, 1991; copies containing record citations subsequently mailed on April 8, 1991, to John T. Allen, Jr., Esq., 4508 Central Avenue, St. Petersburg, Florida 33711; to Michael J. Keane, Esq., Baynard, Harrell, Mascara & Ostow, P.A., 696 First Avenue North, Suite 303, St. Petersburg, Florida 33701; to Stephen Bull, Esq., Bull &

Haggard, 111 N. Orange Avenue, Suite 1200, Orlando, Florida 32801; and to Jeffrey S. O'Brien, Esq., Masterson, Rogers, Patterson, Masterson, O'Brien & Lopez, 696 First Avenue North, St. Petersburg, Florida 33701; and to G. Lee Garrett, Jr., Esq., Stephen O. Kinnard, Esq., Jones, Day, Reavis, & Pogue, 3300 First Atlanta Tower, Atlanta, Georgia 30383-3101.

/S/

APPENDIX 3

DISTRICT COURT OF APPEAL,
STATE OF FLORIDA
SECOND DISTRICT

On Appeal from the Sixth
Judicial Circuit, for
Pinellas County, Florida

Case Nos.
90-02027
90-02028
(Consolidated)

MADISON MANAGEMENT GROUP, INC.
and CH2M HILL SOUTHEAST, INC.,

Appellants,

v.

PINELLAS COUNTY, FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFICATION, AND FOR CLARIFICATION

Pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331, appellee Pinellas County,

Florida, moves for rehearing, rehearing en banc, and clarification of the decision filed March 13, 1992. Alternatively, the County moves for certification of the question identified below to the Florida Supreme Court as being of exceptional public importance. The panel's decision that the County cannot sue its consulting engineer in tort growing out of its contact conflicts with scores of Florida decisions allowing clients to sue their professionals for negligent performance of contractually agreed upon services. Hence, this decision is not only of great significance to the County and its residents, as the panel expressly recognized (Op. 4), it will have an acute impact on this state's law governing professional malpractice claims.

Introduction

1. This case arises from the design and manufacture of the County's water pipeline, which first ruptured in 1979. The non-jury trial of the County's claims against the pipeline's engineer and manufacturer began in January 1989. In October of that year, both defendants moved to disqualify the trial judge on grounds of bias, but the judge denied the motions and proceeded with the case. After a year-long trial, the court entered judgment in favor of Pinellas County on the County's contract wand tort claims CH2M Hill Southeast, Inc., successor to the engineer for the pipeline, Black, Crow & Eidsness, Inc. ("Hill" or the "Engineer"), and against Madison Management Group, Inc., successor to the manufacturer of the pipe ("Interpace").

2. The panel reversed, holding that the trial judge's failure to withdraw from the case was error, and remanded the case for a new trial. Although the panel left all issues open for re-trial as against Interpace, it resolved two issues as to the Engineer on their merits. First, the panel held that the County had no tort claim against its professional engineer for negligent performance of the contractually agreed upon services. Second, the panel held that the County is limited on re-trial solely to a claim that the Engineer breached its direct contract with the County by allowing the use of Class IV wire. It is upon these issues that Pinellas County seeks rehearing, rehearing en banc, clarification, or, in the alternative, certification as a question of exceptional public importance.

Rehearing, Rehearing En Banc, or Certification
As to Tort Claims Against the Engineer

3. The panel held that the County's negligence claim against the Engineer was barred as a matter of law. The panel stated:

> To have an actionable tort claim in a breach of contract case, there must be appropriate pleadings and proof of conduct resulting in personal injury or property damage beyond the breach of the contract.

(Op. 6-7) (citing *J. Allen, Inc. v. Humana of Florida, Inc.*, 571 So. 2d 565 (Fla. 2nd DCA 1990)). The panel concluded that the County "failed to plead an independent tort separate from its breach of contract

claim against Hill" because the complaint "characterized Hill's 'negligence' in the performance of the contract as in fact constituting the breach of contract." (*Id.* 7).

4. In relying upon that general rule, the panel completely overlooked or misapprehended the County's allegation that Hill is a professional (Amended Complaint ¶ 64) and the settled case law which establishes that *special* rules apply to *professional* negligence claims growing out of the parties' contract for professional services. The panel's holding that judgment must be entered as a matter of law on the County's claim against the Engineer for its negligence in performing its professional duties under its contract with the County directly conflicts with controlling Florida precedent and with this Court's own decisions that privity of contract is an *essential* element of -- *not* a bar to -- a professional negligence claim in Florida. Thus, in *Angel, Cohen & Rogevin v. Oberon Investment, N.V.*, 512 So. 2d 192, 194 (Fla. 1987), cited and followed by this Court in *Nickolauson v. Rhyne*, 529 So. 2d 365, 366 (Fla. 2d DCA 1988), the Florida Supreme Court held that attorneys' liability for "*negligence in the performance of their professional duties*" is *limited* to "clients with whom they share *privity of contract*." (Emphasis supplied). As recently as its decision in *Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc.*, 581 So. 2d 1301, 1303 (Fla. 1991), the Supreme Court held that a professional's contractual privity with its client *created* a duty in tort toward that client:

> Clearly, privity between the parties may create a duty of care providing the basis

for recovery *in negligence*. (Emphasis supplied).

The panel's holding that the County cannot sue its consulting engineer for the negligent performance of the contractually agreed upon professional services turns these decisions on their head and makes the very existence of the contract a legal bar to a professional implicitly warrants as part of his contract that he will use due care in performing the agreed upon services, *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507, 509 (1918), a client would -- under the *panel's* opinion -- *always* be foreclosed from suing his professional negligence. But that is directly contrary to the wealth of Florida decisions which have allowed tort claims by clients where their professional failed to use due care in performing the contracted for services.

5. In light of Florida's requirement of privity of contract as a pre-condition to a professional negligence claim, it is clear why the County's pleadings were framed as they were. Indeed, the County's allegations closely paralleled those in *Bayshore Development Co.*, 78 So. at 508-10, where the plaintiff alleged that it had contracted with the architect to prepare building plans and then alleged the "negligent failure to use skill and care on defendants' part in the making and execution of the plans . . . ." *Id.* at 508. The Supreme Court expressly *upheld* that cause of action as one "*in tort growing out of a contract*." *Id.* (Emphasis supplied).

The County's professional negligence claim is equally valid as one "in tort growing out of a contract," and the panel's extraordinary and unprecedented

holding that the client must instead allege negligent conduct by his professional that is "separate" and "independent" of the conduct constituting the breach of the professional's contract directly conflicts with the cited decisions. This creates an issue of exceptional importance to the public which contracts for professional services. The Court should grant rehearing en banc on this point if rehearing is not otherwise granted or, in the alternative, certify the following question to the Florida Supreme Court:

> Whether a client is barred from suing a professional for negligence which also constitutes a breach of the parties' contract for those professional services.

Rehearing, Rehearing En Banc, or Certification As to Contract Claims Against the Engineer

6. The Engineer prepared the contract between the County and Interpace by which Interpace agreed to manufacture the pipe to the Engineer's specifications. That contract expressly provided that Hill's predecessor, Black, Crow & Eidsness, Inc. -- *by name* -- would have certain specified responsibilities in connection with Interpace's manufacture of the pipe. The evidence at trial established that the Engineer subsequently undertook to perform duties specified in the Interpace contract but did not perform them properly.

7. The panel, after reversing on the disqualification issue and remanding for a new trial, concluded that no liability could be imposed on the

Engineer with respect to obligations under the Interpace contract because it was not a party or signatory to that contract. As the panel put it:

> It remains the rule in Florida that ordinarily a contract cannot bind one who is not a party thereto *or has not in some fashion agreed to accept its terms.*

(Op. 8) (emphasis supplied).

Having articulated the rule to be applied to the facts, the panel overlooked or misapprehended the ample evidence in this record from which a trier of fact could find that the Engineer had "in some fashion agreed to accept" the terms of the Interpace contract, thus making this an issue of fact to be resolved on re-trial. For example, there was evidence that the Engineer prepared the County's contract with Interpace and that this contract expressly imposed obligations on *Hill*, "acting for" the County, regarding approval of materials, certification of invoices for payment, inspection of shop drawings, and various other aspects of the pipe manufacture. Moreover, there is considerable evidence in this record regarding Hills' subsequent undertaking of responsibilities specified for Hill in the County's contract with Interpace, and this further demonstrated a manifestation of the Engineer's agreement to accept the terms of the Interpace contract.

In light of this evidence, the rule enunciated in the panel's opinion cannot be applied in this case as a matter of law. Rather, there must a factual determination whether these and other acts established in this record demonstrate that the Engineer had "in

some fashion agreed" to perform the duties it had specified for Hill in the Interpace contract. The panel focuses on certain factors which could lead the trier of fact to find there was no such agreement, but the panel completely overlooks *other*, critical facts -- including the Engineer's drafting of the Interpace contract, a fact *nowhere* mentioned in the panel's opinion -- which could certainly lead a trier of fact to the opposite conclusion. Hence, rehearing should be granted and the panel's opinion clarified to allow the County to present evidence on re-trial in support of its claim that the Engineer agreed to accept, and then undertook to perform, the responsibilities it expressly imposed upon itself, by name, as the County's representative under the Interpace contract.

8. Even apart from this, the Interpace contract cannot be held as a matter of law to be irrelevant to a determination of the Engineer's contractual duties to the County. The panel overlooked the settled principle that the construction of a contract as a matter of law -- as the panel's opinion undertakes to do -- is only appropriate where the contract's language is unambiguous. *See, e.g., Neumann v. Brigman*, 475 So. 2d 1247, 1249 (Fla. 2d DCA 1985); *Courtney v. R.L. Schmeckpeper, Inc.*, 442 So. 2d 294, 296 (Fla. 2d DCA 1983).

The panel does not, and could not conclude that the Engineer's contract with the County was unambiguous. For example, the term "construction," a term used throughout the Engineer's contract with the County, is nowhere defined in that contract and it is undeniably subject to two completely different interpretations by the parties. Thus, although the

Engineer contended at trial that "construction" as sued in its contract with the County referred only to *installation* of the pipe, when it came to calculating the amount of money it should receive under Item F of that same contract for progress payments based on "construction cost," it is undisputed that the Engineer included the full cost of the *manufacture* of the pipe! (R. 9051-55). This alone creates an ambiguity on the face of the Engineer's contract with the County.

In light of that ambiguity, it was entirely appropriate for the trier of fact to look to extrinsic evidence -- including the Interpace contract, in which the Engineer had expressly defined the term "construction" as having precisely the meaning the County had understood it to have in the Engineer's contract with the County -- to construe the contract. *Friedman v. Virginia Metal Products Corp.*, 56 So. 2d 515, 516 (Fla. 1952) (given two reasonable constructions, contract could not be interpreted without reference to the circumstances surrounding it); *Bunnell Medical Clinic, P.A. v. Barrera*, 419 So. 2d 681, 683 (Fla. 3d DCA 1982) (latent ambiguities in contract rendered parol evidence admissible); *see Dickerson Construction Co. v. Process Engineering Co.*, 341 So. 2d 646, 650-51 (Miss. 1977) (contract between owner and contractor -- drafted by engineer -- relevant to resolving ambiguity in engineer's contract with owner). Hence, the construction of the Engineer's contractual duties constitutes an issue of fact to be resolved in the re-trial of this case. The panel, however, overlooking this limitation on the scope of appellate review, undertook to construe the Engineer's contract with the County as a matter of law.

Rehearing or Clarification as to Re-Trial of
County's Contract Claims Against the Engineer

9. The panel concluded that the Engineer was entitled to judgment as a matter of law on "all" the County's contract claims but one -- whether the Engineer breached its contract with the County by allowing the pipe manufacturer to sue Class IV wire. Given the length of the trial proceedings, the enormous size of the record on appeal (262 volumes), and the complexity of these highly technical issues (all of which are acknowledged by the panel at pages 3-4 of its decision), it is not surprising that the panel overlooked or failed to apprehend the force and effect of the evidence establishing the Engineer's breaches of *other* duties expressly imposed under its direct contract with the County. Indeed, many of the trial court's findings of those additional breaches were *not even appealed* by the Engineer, and hence the voluminous evidence establishing those breaches was not focused on in the briefs or oral argument to the panel.

The County must be allowed on re-trial to pursue its claims of those other contractual breaches for precisely the same reason that the County is entitled to assert its contract claim against the Engineer for allowing the use of Class IV wire. The panel correctly recognized the Engineer's contractual obligation to review Interpace's submittal sheets with respect to the wire. But the panel overlooked or misapprehended the substantial competent evidence in the record that the Engineer's review of those submittals -- a review of the Engineer was admittedly required to and did make under Item A(6) of its contract *before* the County executed the construction contract with Interpace

(Compare Interpace contract dated February 25, 1977 with submittal sheets approved by Hill on February 7, 1977 (R. 19043, 9504-06)) -- failed to discover deficiencies *apart* from the Class IV wire deficiency. Among many other things, there was considerable evidence that the Engineer failed to properly check the design formulas set forth in Interpace's submittal sheets (from which it would have discovered that the pipe would not operate at the pressure specified by the Engineer). (R. 7460-61).

Furthermore, the record evidence establishes breaches by the Engineer of other obligations imposed under its direct contract with the County. For example, under Item A(1), the Engineer expressly agreed as a part of its "design" services to "[p]rovide consultation and advice as to the necessity of providing other services such as . . . laboratory testing and inspection of samples or materials . . ." and, in Item A(3), the Engineer agreed to (and it did) prepare the contract for the construction of the pipe. There is an issue of act whether, in order to properly perform those responsibilities, the Engineer should have included a provision in the Interpace contract requiring suitable testing of materials as suggested by the applicable national standards. An issue of fact is also presented regarding the Engineer's improper drafting of the Interpace contract to assign such duties to itself as the County's representative if, unbeknownst to the County, Hill did not intend to accept responsibility for those duties. Hill cannot have it *both* ways.

In addition, there was overwhelming evidence in this record that the Engineer improperly designed the pipeline in the first instance. In particular, it failed to

specify in its design a proper protective coating for the pipeline, in violation of Items A(1) and A(2). (R. 10445-46. 10450). It also failed to properly design placement of relief valves, in violation of Item A(2). (R. 5180-83; 6148-49).

In short, the panel's ruling that only one alleged breach -- Class IV wire -- is left in the County's contract claim against the Engineer overlooks numerous other breaches of the obligations the Engineer expressly assumed in its contract. The panel's opinion should be clarified to make plain that the County may on re-trial pursue all of its claims of breaches of the Engineer's direct contract with the County.

Required Statement for Rehearing en Banc

Pursuant to the requirements of the Florida Rules of Appellate Procedure 9.331(c)(2), we express a belief, based on a reasoned and studied professional judgment, that the panel decision is one of exceptional importance and, further, that the panel's decision is contrary to the following decisions of this Court and that a consideration by the full court is necessary t maintain uniformity of decisions in this Court. *Nickolauson v. Rhyne*, 529 So. 2d 365 (Fla. 2d DCA 1988); *Newman v. Brigman*, 475 So. 2d 1247 (Fla. 2d DCA 1985); *Courtney v. R.L. Schmeckpeper, Inc.*, 442 So. 2d 294. (Fla. 2d DCA 1983).

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APPENDIX 4

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

MAY 19, 1992

Case No. 90-02027
90-02028

CH2M HILL SOUTHEAST, INC.,

Appellant,

v.

PINELLAS COUNTY, FLORIDA,

Appellee.

_____/

BY ORDER OF THE COURT:

Counsel for appellee having filed a motion for rehearing, rehearing en banc or certification and for clarification in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

(Signed)

WILLIAM A. HADDAD, Clerk

c: Stephen M. Bull, Esq.
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APPENDIX 5

SUPREME COURT OF FLORIDA

CASE NO. 80,056

MONDAY, OCTOBER 1, 1992

DISTRICT COURT OF APPEAL
2ND DISTRICT NO. 90-02027
90-02028, 90-03562, 90-03563

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,
ET AL.,

Respondents.
_____/

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, GRIMES KOGAN AND HARDING, JJ., concur

A True Copy

ATTEST:

(Sealed)

Sid J. White
Clerk of the Court

cc: Hon. William A. Haddad, Clerk
Hon. Karleen F. DeBlaker, Clerk
Hon. Fred. L. Bryson, Judge
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Sylvia H. Walbolt, Esquire
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APPENDIX 6

IN THE CIRCUIT COURT FOR
PINELLAS COUNTY, FLORIDA

CIRCUIT CIVIL NO. 83-13313-07

PINELLAS COUNTY, etc.,

Plaintiff,

v.

INTERPACE, etc., et al.,

Defendants.

_____/

PROCEEDINGS:	Request for Clarification.
BEFORE:	Hon. Howard Rives, Judge of the Circuit Court.
DATE:	March 3, 1993.
PLACE:	Judicial Building, St. Petersburg, Florida.
REPORTED BY:	Donald Kanabay, C.M., Official Court Reporter.

KANABAY & KANABAY
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THE COURT: Good morning. I want to apologize to everyone here for not keeping the appointment the other day, but I had a cold and I still have it, unfortunately. Mr. Allen, have you and Mr. Hill discussed the order that you want to proceed on this morning?

MR. ALLEN: No, we haven't, your Honor. As far as which one would be taken up first.

MR. HILL: The one thing we did decide, Judge, was that there are apparently three cases set for consideration before your Honor today: what we call the 60-inch case -- the Pinellas County case -- the West Coast case, and then the CDM case -- and I think we agreed, because of time constraints, to go ahead and start with the 60-inch case.

MR. ALLEN: That's correct. He needs to leave by twelve o'clock.

MR. HILL: Right.

THE COURT: All right. We'll accommodate your schedule, Mr. Hill.

MR. HILL: And we're prepared -- I mean, other people will stay and take care of CH2M Hill --

THE COURT: We have today set side [sic] for you.

MR. HILL: Yes, sir.

MR. ALLEN: Judge, also, we have resolved whatever issues that were pending in the CDM case with Mr. Smith, so we don't have to bother your Honor with that particular matter today. There were discovery matters and things of that kind, which --

THE COURT: Is that the one about whether or not Mr. Price's deposition and the costs of that --

MR. ALLEN: No, sir, that's still going to be, I guess, vigorously argued here. I think that one's still alive. But that comes from the 84-inch case, Judge, rather than the Cross Bar case.

THE COURT: Well, let's see if we can resolve the 60-inch case first. And just let me say, gentlemen, that I have a copy of the Mandate from the Second District in front of me, and I also have a copy of the Opinion, and I'm just as eager as you are to determine what the issues are, and the procedures. My clerks were also kind enough to make a copy of the ALR annotation -- I think I gave you folks the wrong cite -- it was 9 ALR 4 1041 is the article that I had reference to about the annotation relating to jury trials. I think that page 8 or section 8 of that particular article pertains to the various subject matter that we will have at had on this case at some point.

MR. HILL: Your Honor, if I might, I don't know what the logical way is to start, with respect to the 60-inch case, but you said you have the mandate in front of you?

THE COURT: Yes, sir.

MR. HILL: One of the things that the Mandate, read with the Opinion, says, is that the Court will enter a Judgment in favor of CH2M Hill on all issues save one. With that in mind, I prepared and have given to Mr. Allen and Mr. Keane a copy of a proposed final partial judgment which would be consistent with the Mandate.

MR. KEANE: Are you reading from the Mandate, you say?

THE COURT: No, it's in the Opinion.

MR. HILL: It's in the Opinion. Page 88 of the Opinion says, we hold further that Hill is entitled to judgment as a matter of law on all issues save one, and the new trial as to Hill shall be limited to the one issue dealt with below.

So what we've done is just track that language in our proposed Final Judgment, your Honor, and submit that to you for your consideration.

THE COURT: Well, looking at page 6 of the Opinion, if you have it -- the Court's own Opinion,

* * *

helpful to have that in front of you. That's the CH2M Hill contract which is the subject of this case.

MR. HILL: If your Honor wants me to respond now, I can, because I think it's rather simple as to all of this.

THE COURT: I just wondered how -- I don't want to break into Mr. Keane's planned arguments, but --

MR. HILL: Well, if he'd like to finish his argument --

THE COURT: Let him conclude, and then we'll see.

MR. KEANE: This may be a little bit -- the issue is squarely raised by their proposed final partial judgment. What they would like you to sign, your Honor, they want you to say that the only thing we get to plead and proceed on at trial is the one breach of the contract by CH2M Hill, namely, allowing the pipe manufacturer to use class 4 wire. And if you don't read the Opinion carefully enough, it would seem to say just that. But you have to look at the entire Opinion and the law of the State of Florida to know exactly where we stand, and this is where I believe we stand.

If you look at the brief that was filed by CH2M Hill, they never appealed several of the issues that we raised as breaches of the contract. They just simply never gave the Second District Court of Appeal the opportunity to even address the issues. For example, if you look at page 40 of the Complaint, we complained that CH2M Hill failed to specify or to have performed sufficient inspection and testing of materials used in the manufacture of the pipe to ensure the pipe would be manufactured and delivered as required by the specifications. Sub (E) on that page, we complained that CH2M Hill failed to certify completion of the project, which they were required by their

contract to do. Turning to page 42, (H) complained that they failed to specify acceptance inspection procedures adequate to identify defective pipe, and it goes on in some detail. They failed to identify incorrect pipe loading and unloading techniques; failed to require Interpace to provide samples and specimens of pipe. Well, if you look at the CH2M Hill contract, that's exactly the category and class of activities they contracted with Pinellas County to do. Judge Bryson, in his Final Judgment, found violations of each of these things, and CH2M Hill never appealed those issues.

And of course, if you go back to what did the Second District do, the first thing the Second District did was they wiped out the judgment, because they said the Judge was biased or should have stepped down. Once having done that, we're back as though that case was never tried, and consequently the only issues that the District court could dispose of were not issues that were fact dependent, where there was an issue of fact to be tried, as to whether there was or was not a breach of the CH2M Hill contract; the only thing they could do was look at the documents and determine whether, as a matter of law, certain duties existed or didn't. And in fact, they found one of those issues for CH2M Hill, when they found that they could not find among the documents an affirmative duty to go to the plant. That's in there, and we disagree with their reading of that, but that's what they found as a matter of law.

The next thing that they did was they found there was no ability to merge the two contracts together. You could not -- even though CH2M Hill was written on the fact of the Interpace contract, they

defined themselves as the engineers, they actually undertook to do all of the things in the Interpace contract -- somehow the Second District came down and landed on the thing and determined that CH2M Hill, even though they drew that contract as a contract document, didn't pick up any of the duties they defined for themselves.

Frankly, it's a preposterous Opinion, it absolutely flies in the face of everything that we know about construction documentation, but that's what they have done. So they decided those two issues as a matter of law. But what they could not and did not do was decide anything that had to be determined by a finding of fact, because they couldn't. There were no summary judgment proceedings available, there were no summary judgment orders that were made the subject of the appeal. Instead, what these folks now would like to have you do by their final partial judgment is gut the entire contract action. Every one of these things are dependent on a trial and a finding by the trier of fact as to whether, regarding Paragraph 1, under item (A), design of improvement -- that's at page 3 of the contract -- we complained that they did not properly provide consultation regarding laboratory testing, inspection of samples or materials, special consultation or act as the owner's representative in connection with those services. That's what they were required to do.

They never appealed that issue on page 3. The next thing they were supposed to do, so that . . .

APPENDIX 7

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 93-01203

PINELLAS COUNTY,

Appellant,

v.

CH2M HILL SOUTHEAST, INC.,

Appellee.

_____/

APPELLEE'S ANSWER BRIEF

On Non-Final Appeal from the
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in and for Pinellas County, Florida

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Introduction

This appeal brings to the court the question of whether the court meant what it said in 1992 when it wrote in the prior appeal of this case:

> We hold further that Hill is entitled to judgment as a matter of law *on all issues save one*, and the new trial as to Hill shall be limited to the one issue [of breach of contractual design responsibility by allowing the use of class IV wire for the pipeline] dealt with below. (Emphasis added).

CH2M Hill Southeast, Inc. v. Pinellas County, 598 So. 2d 85, 88 (Fla. 2d DCA), *rev. denied*, 613 So. 2d 7 (Fla. 1992) ("*Hill I*"). The trial court has entered an order which takes this court at its word, ruling by way of partial summary judgment that Pinellas County (the "County") is precluded from litigating anew all issues which this court resolved as a matter of law against the County.

CH2M Hill Southeast Inc. ("Hill") will demonstrate that the County is seeking to circumvent "law of the case" as established in *Hill I*, and endeavoring one more time to find liability against Hill where none can lawfully be found. That demonstration will show that the multiplicity of proposed issues which the County has presented to the court are in fact repackaged merchandise -- issues this court has already reviewed and found legally unavailable against Hill -- and that the trial court was correct in barring the County from reasserting those rejected legal theories.

Statement of the Case and Facts

The *Hill I* decision followed a non-jury trial in which the County sued Hill, with whose predecessor (Black, Crow & Eidsness, Inc.) it had contracted for the design of 13.5 miles of pipeline, for alleged negligence and breach of contract (V. 8 at 972-80).[1/] More counts were included in the action against the manufacturer of the pipe, Interpace, Inc. (now known as Madison Management Group, Inc.), including charges of negligence, breach of contract, breach of warranty, strict liability and fraud. (V. 8 at 960-72). In its First Amended Complaint, the County alleged that Hill was responsible for the manufacturer's production of defective pipe, based on alleged manufacturing oversight and other obligations. (PR. 40-47). Madison Manufacturing Group, Inc. participated in the *Hill I* appeal, but is now in bankruptcy. The County is presently pursuing a second trial only against Hill.

1/ References will be made in this brief by designation to the consolidated record of *Hill I* and this appeal. Volume references (V. at ___) will follow factual references to the *Hill I* record. Record references (PR. ___) correspond to the "post-mandate" record compiled for this appeal. Additionally, many references are included to the briefs of the parties in *Hill I* and, as well, to the motion for rehearing and clarification filed by the County in *Hill I*. A separate appendix accompanying this brief includes the County's Answer brief in *Hill I*, Hill's Reply brief in *Hill I*, and, a complete copy of the County's motion for rehearing and clarification in *Hill I*. The *Hill I* Initial brief is already included in the post-mandate record. (PR. 70-151).

The County has made an issue of what this court did and did not consider in its *Hill I* decision. Yet, the County has not provided in its Statement all information relevant to that inquiry. Consequently, Hill provides this Statement in order to round out the court's understanding and recollection of *Hill I*.

In *Hill I*, the panel had before it a controversy encapsulated in a trial transcript of 14,000 pages, a record on appeal of 265 volumes, a record index of 437 pages and a final judgment of 200 pages, all reflecting trial court activities from a one-year trial. In that appeal, Hill raised multiple issues and arguments, ranging from disqualification of the trial judge to the legal soundness of tort claims, contract claims and damage claims.

In deciding that prior appeal, the court determined as a first matter that the trial judge should have disqualified himself based on instances of judicial misconduct during the trial. The court's review of the case went beyond just that issue, however, based on the extensive briefings by the parties and the availability of exhaustive appendices. The court was presented on appeal with a multiplicity of issues, including the impropriety of any tort claim against Hill, the invalidity of the County's theory of merging unrelated contracts, and the County's contention that Hill had duties (contractually, in tort and statutorily) beyond those which it contracted for, such as overseeing the pipe segment manufacturing process.[2/] The court considered the range of issues presented, and affirmatively addressed them. The court had to,

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2/ Initial Br. in *Hill I* at 35-60.

because the legal posture of the case, the court found, had been framed by the manner in which the County chose to write its complaint against Hill.

The County alleged a host of tort claims against Hill in 22 detailed subparagraphs lodged in paragraph 66 of its Count IX. (PR. 40-47). The County then pled its breach of contract claims against Hill in one short sentence, denominated as Count X, which did nothing more than incorporate by reference the *tort* allegations in paragraph 66. (PR. 47). In so doing, the County treated alleged acts of contract breach by Hill as identical with and indistinguishable from the acts which the County claimed were tortious.[3/] Based on the County's trial-framing complaint and the 200-page, 1,164 footnote final judgment which the County had drafted and the trial judge signed without so much as a comma being changed, *all* contract breach allegations were brought under scrutiny by the court when Hill challenged and the court passed on the legal issues presented.

The briefs, appendices and motions of the parties in *Hill I* reveal what was before the court. Hill's initial brief, of course, was the starting point.[4/] In response to Hill's initial briefing, which included contract as well as tort issues, the County's copious answer brief asserted that a "merger" theory bound Hill to perform covenants of Interpace's (the pipe manufacturer's)

3/ *See Hill I*, 598 So. 2d at 88.

4/ The County acknowledges that Hill's initial brief is a foundation for determining what was presented in *Hill I*. County's Initial Br. at 8.

contract with the County.[5] It also urged the court to conclude, as had the trial court, that Hill had a contractual responsibility to oversee the manufacture of pipe segments under both the Hill and Interpace contracts.[6] In essence, the County defended its amalgam of tort and contract duties, based on the preeminence of tort duties in its complaint and the trial court's findings of both tort and contract breaches in the final judgment.[7]

The court expressly rejected the County's merger theory, meaning that Hill was not bound to perform any terms of the Interpace contract with the County.[8] The court expressly rejected the assertion that Hill had a manufacturing process oversight duty,[9] based on the terms of the authorized sections of Hill's contract and in response to Hill's uncontroverted contention that *the County* had assumed resident engineer/general contractor status as to all Item C services specified in the County's contract with Hill. The court also expressly rejected, without labeling them, all other alleged contract and non-contract duties which the County had sought to impose, "save one."[10] The court held that only Hill's approval of class IV wire in

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5/ County answer brief in *Hill I* at 17-24.

6/ *Id.* at 15, 19-21.

7/ *Id.* at 15-40.

8/ *Hill I*, 598 So. 2d at 89.

9/ *Hill I*, 598 So. 2d at 88-89.

10/ *Id.* at 88.

the design criteria was an appropriate fact issue to be considered on retrial.[11/]

The County filed a detailed motion for rehearing and clarification, in which it devoted lengthy sections to the court's purported misapprehensions concerning alleged breaches of the Hill contract. (PR. 158).[12/] The court denied rehearing. (PR. 163). The County next sought review of the court's decision by the Florida Supreme Court. That request for review was denied. (PR. 164).

Following the court's decision and issuance of the mandate in *Hill I*, remand proceedings commenced in the circuit court based on the County's unamended First Amended Complaint (the "complaint"). In pretrial proceedings, the County requested clarification as to the issues available for retrial and Hill responded by presenting the circuit court with this court's *Hill I* decision and mandate. (PR. 238-240). The trial court received written memoranda from the County and Hill, and it heard argument before entering the order now brought for review -- an order adhering precisely to the mandate of this court and leaving for retrial the sole issue of Hill's alleged contract breach concerning class IV wire. (PR. 243).

The County filed an appeal from the order (PR. 295-298), and, alternatively, a petition for writ of certiorari. Hill moved to dismiss the appeal. The

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11/ *Id.* at 89.

12/ County's Motion for Rehearing, etc., in *Hill I* at 9-12.

certiorari petition was dismissed by the court, and Hill's motion to dismiss was denied.

At the County's request, the record on appeal comprises the enormous record compiled from the first appeal in *Hill I*, plus materials from below that were compiled since the mandate was issued, including Hill's initial brief in *Hill I* and the County's motion for rehearing and clarification in *Hill I*. The court, of course, may in any event take judicial notice from its own files of all the briefs and motions filed in *Hill I*. *Department of Legal Affairs v. District Court of Appeal, Fifth District*, 434 So. 2d 310, 313 (Fla. 1983); *Barry Hinnant, Inc. v. Spottswood*, 481 So. 2d 80, 81 (Fla. 1st DCA 1986).

Summary of Argument

Upon being presented on reversal with the *Hill I* decision and the court's mandate, the trial court entered an order which tracked exactly the limitations on retrial which this court had directed. Rejection of the County's request to expand the number of triable issues beyond class IV wire was the only course open to the trial court. The trial court did not err, abuse its discretion or deviate from the mandate in following the directions of this court on remand.

The issues which the County seeks to have retried other than class IV wire are barred by the doctrine of "law of the case." In the prior appeal, the court considered and rejected each of the issues now pressed on the trial court for retrial. The County's election to treat alleged contract breaches as identical

with and subsidiary to alleged torts required the court to evaluate and analyze each contract breach alleged in the County's First Amended Complaint. Each of those issues was extensively briefed, argued and given independent appellate review. The contract claims now being presented were reviewed again on the basis of the County's motion for rehearing and clarification of the court's decision in *Hill I*. In short, the County has had its day in court on all contract issues, and the court was fully informed when it held that all issues other than class IV wire had been considered and resolved.

The County has made clear that its dissatisfaction lies directly in what the *Hill I* decision did, not what was omitted. The County described the *Hill I* decision to the trial court as "preposterous." For all intents and purposes, the County is seeking reconsideration of the *Hill I* decision. The time for rehearing has long expired, however, and the County has no right to a rehearing on the County's prior denial of rehearing.

Argument

There are three independent reasons why the trial court's Final Partial Judgment should be affirmed. First, the trial court precisely followed the opinion of this court in *Hill I* and the court's subsequent mandate, as it should have. *State Farm Mut. Auto. Ins. Co. v. Stack*, 543 So. 2d 782 (Fla. 3d DCA 1989); *Patten v. State*, 531 So. 2d 203 (Fla. 2d DCA 1988). The County's suggestion that the trial court departed from the court's earlier directive is completely mistaken.

Second, the issues sought to be retried by the County were legally challenged by Hill in the first appeal, were fully considered by the court, and were disposed of. Under the doctrine known as "law of the case," they are not subject to being revived anew. Third, the County's arguments are in any event not really directed to action taken by the trial court or any omission of issues considered in *Hill I*. Rather, the County's grievance lies with the adverse decision which the County received in *Hill I*. That decision was rendered and became final on May 19, 1992. The County is belatedly, and improperly, seeking reconsideration of that decision.

1. The trial court faithfully and strictly adhered to the court's *Hill I* opinion and mandate.

There has been no departure from the opinion or mandate of this court such as to warrant a reversal of the trial court's Final Partial Judgment. The trial court could not have more faithfully followed this court's clear instructions. In *Hill I*, the court stated that Hill

> is entitled to judgment as a matter of law on all issues save one, and the new trial as to Hill shall be limited to the one issue dealt with below.

598 So. 2d at 88. That "issue" was identified in the *Hill I* decision as whether

> Hill had breached its contractual design responsibilities by allowing the pipe manufacturer to use class IV wire for the pipeline.

598 So. 2d at 89. Subsequently, the court issued a mandate which stated:

> YOU ARE HEREBY COMMANDED that further proceedings be had in said cause *in accordance with the opinion of this Court* . . . (emphasis supplied).

(R. 165). On return to the trial court, Hill moved for entry of judgment in accordance with this court's opinion and mandate, quoting from the express language just recited. (PR. 244-246). The Partial Final Judgment which is the subject of this appeal (PR. 243), tracks *exactly* both the language in *Hill I* and the directive to follow that language in the court's mandate. The trial court, obviously, did *not* depart from the court's prior action in the slightest.

2. Issues on remand other than breach of contract based on the use of Class IV wire are precluded by the *Hill I* decision.

The arguments presented by the County as to why it should be entitled to pursue claims which were adjudicated in the first appeal do not justify the court's retreat from its expressed limitation on re-triable issues in its *Hill I* decision. As will be shown, the County has merely repackaged its negligence claims and its borrowed duties from the Interpace contract into

"breach of contract duty" verbiage. It has done this by listing as potential contract breaches the sub-counts of the *negligence* allegations in its complaint.

To be more precise, the County has listed 42 specific, alleged breaches.[13/] The court cannot help note that this itemized list is taken in precise order from paragraph 66 of the County's First Amended Complaint -- the County's "negligence" count -- which the court in *Hill I* expressly ruled out of bounds for retrial. It's true, of course, that paragraph 70 of the County's complaint asserts a breach of contract by a wholesale incorporation by reference of paragraph 66. (PR. 47). That alone does not make negligence duties into contract duties, of course. That fact does, however, prove the point that the County in reality seeks again to have the court intermingle tort notions, Interpace contract provisions and its rejected merger theory, in the hope of having a second trial against Hill on its mishmash of proofs.

A careful comparison of the County's complaint and the contract which grounded the relationship between Hill and the County, together with a look at the appellate briefs and motions in *Hill I*, will show that the court reviewed all issues in full in considering the formulation of its *Hill I* decision, and that the County is simply craving the "second bite" here of the apple into which it improperly bit prior to the *Hill I* decision.

13/ County's Initial Br. at 15.

a. The County's First Amended Complaint.

A grasp of the issue on appeal requires a comparison of the County's amended complaint with the terms of its contract with Hill. After all, it is that comparative analysis which the County would indirectly have the court revisit. Yet, the County did not even attempt that comparison. Hill suggests the omission was a conscious one, for such an analysis leads inexorably to the conclusion that the court's *Hill I* decision was correct in foreclosing on retrial any issue other than an alleged breach of contract for allowing the use of class IV wire.

Beginning with Count IX on page 38 of the County's amended complaint, in numbered paragraph 63-66, the County asserts a tort theory of negligence against Hill. Paragraph 66 consists of 22 separate subparagraphs of allegedly negligent behavior. Those 22 subparagraph assertions are not available to the County on retrial, of course, having been declared in *Hill I* to be improper and unavailable.

The County's sole allegation of *contract* breach is contained in paragraph 70 of its amended complaint, which reads in its entirety:

> The Defendant, CH2M HILL SOUTHEAST, INC., breached its contract with the Plaintiff, PINELLAS COUNTY, in the manner described in Paragraph 66.

(PR. 47). That breach of contract allegation against Hill will seem familiar to the court, for that unadorned

allegation of contract breach was both identified and quoted in the *Hill I* decision,[14] where the court rejected the County's attempt to piggyback its tort and contract allegations as if they were interchangeable. There are dual lessons to be learned from the thoroughness and precision of the court's *Hill I* decision in this regard.

First, of course, tort claims which parallel contract claims are impermissible. The County concedes as much, as it must given the holding of the *Hill I* decision. Second, however, and more significantly for this appeal, the court in *Hill I* had before it each of the 42 allegations of misconduct (taken from paragraph 66 of the County's complaint) which the County now claims constituted Hill's breaches of contract. Substantively, the court mastered and spoke to the interplay between the precise allegations of the County's complaint and the alleged breaches of contract on which the County then purportedly travelled. It cannot be said that the court failed to consider the significance of its directive of remand for retrial on one issue alone. The court was clearly cogent and cognizant when it held in *Hill I* that Hill is entitled to judgment as a matter of law "on all issues save one . . . ."[15]

The problem that now plagues the County is the manner in which it chose to pursue Hill in its case-framing complaint -- its allegations of negligence with great precision and detail, followed by a one-sentence, wholesale incorporation by reference of any

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14/ 598 So. 2d at 88.

15/ *Id.*

hypothetical contract breach claims. The County's pleading stance never articulated contract breaches by Hill; it repeated *negligence* allegations, almost as an afterthought, and without contract-based particularity. That pleading choice is the very reason that prior action by this court, and the action taken by the trial court on remand, were predicated on a complete visitation to the County's contract claims.

b. The parties' briefings in *Hill I* focused on the Hill contract.

Were the court to compare the parties' briefs in *Hill I* with the multiple contract issues the County says were not addressed there, it would find that virtually every now-asserted contract claim was argued to the court previously. A sequential review of the briefing in *Hill I* makes that clear.

Hill endeavored in its initial brief to explain that the limitations of space obviated any opportunity to rebut one-by-one the recitals of breach found in the County-crafted final judgment, signed without modification by a judge who was prejudicially biased in favor of the County.[16/] Instead, Hill took on the two themes of contract breach which coursed their way through the County's amended complaint and dominated the County's trial presentation; namely, the "merger of contract" theory, and the manufacturing oversight theory.[17/] In pursuit of a bloated tort

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16/ *See* Initial Br. in *Hill I* at 1.

17/ *Id.* at 44-45.

recovery, the County had elected to entangle every one of its contract claims with these two strains. It did this in two ways.

First, the County merged the two contracts as if they were one, thereby trying its contract claims as if alleged breaches of the Interpace contract were in fact violations of the provisions of the Hill contract.[18/] Added to this puzzling process and fully sanctioned by the trial court, the County reached outside the Hill contract itself to assert as well that Hill was obligated to supervise, test and challenge the pipe segment manufacturing and installation process.[19/] These legal and factual embellishments on the actual contract relationship between Hill and the County were driven (as noted above) by its election to piggyback all alleged breaches of contract on a lengthy and detailed recitation of negligence duties.

In bringing to this court the County-crafted final judgment, Hill did the only thing possible. It focused the court's attention on Hill's contract with the County, with a specificity that the County had never been required to face in the first, faulted trial. Hill, of course, conceded at the outset of its initial brief that it would be impossible to trudge item by item through the misperceived and malformed contract breaches identified in the final judgment, given the sweeping theoretical and imprecise foundations on which it rested. So, Hill parsed the County's improper theories

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18/ *See* County's Answer Br. in *Hill I* at 16-24.

19/ *Id.* at 21-26.

against the contract itself and analyzed the so-called four, "Item" services Hill had contracted to provide.

First, Hill established that many of the alleged manufacturing oversight breaches claimed by the County were founded in Item A services in the Hill contract -- a section devoted to the design of the pathway for placement of the pipe and to the issuance of general specifications for the project improvements.[20/] Hill next identified Item B services -- those applied to installation of the pipe line and review of shop drawings.[21/] Hill noted in that context the express disclaimer in Item B for any materials testing services of the pipe segments, or otherwise.[22/] The validity of this express disclaimer, incidentally, was never challenged by the County. Instead, it sought to circumvent that disclaimer by the assertion of its "contract merger" theory.[23/]

Hill next explained, as the undisputed facts established and the County continually chose to ignore, that the County itself elected to perform the breadth of resident engineering and contractor services related to the installation phase of the project, and also performed

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20/ Initial Br. in *Hill I* at 45-46.

21/ *Id.* at 46-47.

22/ *Id.* at 47.

23/ Answer Br. of County in *Hill I* at 44-55.

manufacturing site inspections.[24/] The services identified in Hill's contract under Item C were duties that were never Hill's responsibility because they were never requested from Hill by the County as the contract required. Among the multiple and diverse duties which the County absorbed in taking on the Item C services for itself were the responsibilities to oversee and inspect the materials brought to the construction site and the work of the contractor for the installation of the pipe segments and other aspects of the system, on a daily basis. (V. 96 at 14225, 14231, 14235-36, 14256; V. 98 at 14617-19). At this stage of the project, and pursuant to its agreement with Interpace, the County repeatedly inspected the pipe segments manufacturing plant, and observed the processing of the aggregate used to

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24/ Initial brief in *Hill I* at 47-48. The County not only became the general contractor on this project, but it recast the contract which it signed with Interpace. It took a Hill-provided form contract designed for a contractor relationship and then signed it directly with Interpace. *Id.*; *see also* Reply Br. in *Hill I* at 12. The incentive for this procedure was that the County saved sales tax by purchasing the pipe directly, rather than through an installation contractor. Initial Br. in *Hill I* at 48. A number of the County's present alleged breaches are still grounded in its refusal to acknowledge its own "resident engineering" responsibilities arising from its contract with Interpace. As a prime example, the County contends that Hill was remiss in drafting portions of the manufacturer's contract with the County. This entirely ignores the discussion in *Hill I* briefing to the effect that the County itself modified the use of that "shelf" document by gerry-rigging a Hill form contract more appropriate for use by a construction contractor engaging a manufacturer for supply of pipe segments and component parts and materials. (Reply Br. in *Hill I* at 1, 12).

manufacture the cores and concrete coating of pipe segments. (V. 96 at 14229-259).[25]

Hill lastly pointed out that the miscellaneous, Item D services in its contract were, for the most part, never requested by the County.[26] Among those services not requested were materials testing services, including "laboratory testing" on the pipe segments and their components such as wire, mortar casings and coatings. (PR. 1946).[27]

The County's answer brief in *Hill I* was dominantly devoted to a defense of the County's merger and manufacturing oversight theories of contract breach.[28] As something of an addendum to its contract breach arguments, the County argued that Hill had effectively waived objections to many of the supposed contract breaches found in the final judgment by Hill's declining to rebut, point-by-point, the 200-page final judgment drafted by the County and approved without alteration by the trial judge.[29] The court did not expressly discuss the County's waiver theory in its *Hill I* opinion, but plainly it had to have rejected that theory in rendering its decision.

25/ These facts and their legal implications were fully briefed in *Hill I*. Initial Br. in *Hill I* at 7-9, 47, 55.

26/ Initial Br. in *Hill I* at 7, 55.

27/ *Id.* at 55.

28/ Answer Br. in *Hill I* at 15-26.

29/ *Id.* at 31.

c. The County's present allegations are traceable to issues rejected in the *Hill I* decision.

As a consequence of the *Hill I* decision, the County's contract with Hill must be considered independent and apart from the County's contract with Interpace. The County has reverted to a commingling of the two contracts, however, as if that issue had never come before the court and been rejected.

By charting some 42 matters that are alleged to constitute "contract" breaches, the County has merely served up to the court a restatement of its fallen negligence subparagraphs and its reattribution to Hill of contractual duties placed on Interpace, the manufacturer. A careful review of the County's contract with Hill, standing alone and freed from Interpace duties and tort assertions, when compared with the 42 items listed, reveals that the *Hill I* decision was correct in foreclosing on retrial all but class IV wire.

The County's chart commences with a three part acknowledgment of points it recognizes to be law of the case from *Hill I*:

(1) Hill has no responsibility for duties identified in the manufacturer's separate contract;

(2) Hill had no duty to inspect the pipe segment manufacturing process; but

(3) the class IV wire issue has been remanded for a determination of whether that design criteria constitutes a breach of Hill's contract.

Thereafter, the County's understanding of the breadth of *Hill I* and that of Hill diverge completely.

(4) - (6) Alleged breaches 4, 5 and 6 involve limitations in design concerning soil conditions for the pipeline. Hill's briefing established, without contradiction, that the County accepted Hill's Item A services (in Hill's contract) without dispute.[30/] Insofar as any "testing" obligations the County implies were imposed on Hill by virtue of Item A, that interpretation is fully belied by the exclusion of testing responsibilities in Item D(2), absent specific request by the County, which was never made. This fact was surely conceded by discussion in Hill's briefs and conspicuous silence in the County's answer brief in *Hill I*.

(7) Alleged breach 7 concerns failure to design for wire ductility. The County's answer brief formerly asserted this to be a breach of accepted Item A services in the Hill contract and a breach of the Interpace contract.[31/] Neither premise remains a plausible basis to assert a contract breach after *Hill I*.

30/ Reply brief in *Hill I* at 1.

31/ Answer brief in *Hill I* at 4, 6.

(8) Alleged breach 8 asserts inadequacy in design of safety factors for the pipeline and pipe segments. But the parties addressed with particularity the issues of pressure rating of the pipeline and the absence of an in-service break under normal operating conditions in the first appeal.[32/] The County's allegations of a breach in design safety continue to be wildly speculative. Apart from this, the County previously presented this aspect of the case as another form of manufacturer's contract breach by Hill,[33/] which cannot survive the rule of non-merger identified in the *Hill I* decision.

(9) Alleged breach 9 involves failure to review design calculations for individual pipe segments. This can plausibly relate only to the question of design pressure, which was fully briefed in *Hill I* and demonstrated to be without substance.[34/]

(10) Alleged breach 10 concerns Hill's allowing the manufacturer to specify ASTM A-648-73, which the County claims was unrecognized by AWWA C-301-72. To the extent this issue relates to design criteria for the approved use of Class IV wire, the issue was previously briefed, but remains available

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32/ Initial Br. in *Hill I* at 60-61; County's Answer Br. at 27; Reply Br. at 18.

33/ Answer Br. in *Hill I* at 30.

34/ See footnote number 28.

for retrial. The allegation has no meaningful content, in any event, but consists of mere camouflage to the wire specifications issue. Obviously, a standard finalized in 1972 (AWWA C-301) could not reference a standard issued in 1973 (ASTM A-648). But, Hill explained that ASTM A-648-73 was a more specific successor to ASTM A-227, which for the first time was limited to wire wrapping for pre-stressed concrete pipe segments.[35] The AWWA committee drafters later revised the AWWA standard to incorporate the new ASTM standard. It was hardly surprising that the manufacturer's submittals included this standard and that Hill found it to be unremarkable. This is a nonsense, non-issue of terminology without substance.

(11) Alleged breach 11 involves Hill's approval of 17 rather than 16 gauge cylinder steel. This issue was briefed by the County as a Hill breach under Item A of its contract in *Hill I*, an avenue of liability now removed from the case.[36] Moreover, the County's own manufacturing oversight and resident engineering responsibilities in the manufacturing and installation phases of the project provided its opportunity to question this feature, and foreclosed Hill's responsibility for this pipe segment attribute.

35/ Reply Br. in *Hill I* at 16-17.

36/ County's Answer Br. in *Hill I* at 4, 6.

(12) Alleged breach 12 concerns Hill's specification of "only absolute minimum standards" for the pipe segments. AWWA C-301-72 was the standard of compliance of the day when Hill designed the project, and that standard was specifically incorporated in the specifications, as demonstrated in *Hill I* briefing.[37/] Whatever novel characterization the County now chooses to place on the standards, it no longer has an "independent tort" claim available to it.

(13) The County contends that Hill failed to review project documents submitted by the manufacturer to the County. This supposed function was a manufacturer's contract duty, not part of the Hill contract.[38/]

(14) The County urges breach in Hill's failure to perform inspection and testing of materials used in manufacture of the pipe segments. This "manufacturing oversight" duty was foreclosed by *Hill I*. The County again ignores that test results on materials used in the pipe segments were to be sent to the County if it asked for them, pursuant to the AWWA standard incorporated in the County's contract with Interpace. This inspection phase of the

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37/ In fact, the County's Answer Brief in *Hill I* at page 21 maintained that AWWA C-301-72 was "an integral part of the . . . specifications," which were part of the Interpace contract with the County.

38/ County's Answer Br. in *Hill I* at 8-9.

project was to be performed by the County, not Hill.

(15) Hill's breach is contended from its failure to determine admixtures used in the pipe segments. The County stubbornly refuses to acknowledge that this manufacturing oversight function was ruled out by the *Hill I* decision.

(16) Hill is alleged to have breached its contract by not knowing which admixtures were used and by failure to inspect their use. Of course, this manufacturing plant oversight duty was also foreclosed by the *Hill I* decision.

(17) Hill is said to have breached its contract by failing to require additional tests of pipe segment materials and the segments beyond the standards and specifications drafted. Plainly, this is also a repackaged manufacturing oversight duty, since there would be no reason to expand upon contract specifications without knowledge of manufacturing activities. That knowledge was to be gained by the County when it chose to become the responsible figure for manufacturing oversight, not by Hill.

(18) The County maintains that Hill breached its contract by failing to require that test results, affidavits or certifications of compliance be supplied. The allegation does not state to whom those results were to be supplied, but the briefing in *Hill I* established that test results were to be sent to the County

by virtue of the manufacturer's contract with the County which incorporated the AWWA standard requiring test reports to be submitted to the purchaser.[39] Hill had no manufacturing phase duties.

(19) It is claimed that Hill breached its contract by certifying completion of the project without receipt of a certification of compliance. While Item B(6) of Hill's contract called for a recommendation to the County as to final acceptance of the "construction" work, the briefing in *Hill I* established conclusively that the County acted as resident engineer with day-to-day surveillance of the installation of the pipe segments, and with inspections (and some testing) regarding the manufacturing of the pipe segments.[40] This alleged breach again ignores the realities of the County's superseding command function of the resident engineering stage, which it specifically excluded Hill from performing. The County's resident engineering responsibilities were fully briefed by Hill and before the court in *Hill I*.

(20) This alleged breach assets that Hill did not provide adequate "acceptance inspection procedures" to identify defective pipe. The County never requested this function, which was an Item C duty of the Hill contract performed by the County itself.

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[39] *See* AWWA C-301; §1.9.6. *See also* Initial Br. in *Hill I* at 5.

[40] *See, e.g.*, Initial Br. in *Hill I* at 7-9.

(21) It is claimed that Hill failed to inspect the work properly. This was a resident engineering task performed by the County, as well, and excluded by non-authorization of Hill. The County chose to perform this function on its own, and it cannot at this late date escape that election. Page 19 of the County's answer brief in *Hill I* stated

> "The [manufacturer's] contract required [it] 'to permit a representative of the County, and/or its Engineers . . . to inspect the work and progress, or any of the materials . . . .'"

Of course, insofar as this vaguely asserted breach implies manufacturing oversight duties of Hill, that argument has been removed as a matter of law by *Hill I*.

(22) It is asserted that Hill breached by failing to identify incorrect pipe loading and unloading techniques. The standards specified by Hill, of course, refer to the proper procedure. More importantly, it was not Hill, but the County which observed the pickup and delivery of the pipe segments on a daily basis with persons supposedly expert to the task. This on-the-site task was a resident engineering responsibility of the County, and excluded by lack of authorization for Hill to perform Item C of its contract.

(23) It is contended that Hill breached its contract by failing to require the manufacturer to provide samples and specimens of pipe manufactured materials as provided for in the standards and specifications. This alleged breach again points out the County's disinclination to obey the dictates of *Hill I*. As noted previously, the County's contract with the manufacturer allowed it to perform inspection functions which Hill was nowhere obligated to perform. If these called-for samples were not provided, then it was due to the County's affirmative lapse, not any obligation of Hill.

(24) Hill is alleged to have breached its contract by failing to examine and test pipe segment components. This function was excluded with particularity in Item B of Hill's contract, and not authorized as an elective service in Item D(2).[41/]

(25) With similarity to alleged breach number 20, Hill is alleged to have breached by failing to require the manufacturer to provide an affidavit of compliance.[42/] The County, of course, accepted the project without this certificate. It was a duty of the manufacturer to provide this certificate to the County, as specified in the manufacturer's contract with the County.

41/ For example, see the Initial Br. in *Hill I* at 6, 7, 47.

42/ *Id.* at 7.

(26) It is alleged that Hill breached its contract by failing to require proper repairs to pipe damaged during transportation or installation. The County was the resident engineer for the installation phase of the project, and it took on this duty within the scope of that phase. Hill could have performed this duty under Item C of its contract, but the County never authorized or paid it to do so.

(27) It is alleged that Hill breached its contract by failing to detect that the pipe coating was mortar rather than concrete. Hill had no manufacturing oversight responsibility and the County, in its performance of that task or its resident engineer responsibilities, could have detected this readily had it mattered. (Actually, the facts were that the manufacturer's submittal was clarified to call for mortar coating, rather than concrete. There was no mistake.)

(28) It is alleged that Hill failed to design the pipeline to work at pressures up to 150 psi. The parties fully briefed this issue in *Hill I*[43/] and the court must have recognized from its review of the contracts that Hill was to design the pipeline for operation at 100 psi. A safety factor was specified for pipe segments to operate at pressures up to 150 psi with a surge factor of 210 psi. This was briefed, argued and considered, and the court found no breach.

43/ Initial Br. in *Hill I* at 4, 18, 60-61; County's Answer Br. at 29-30.

(29) It is alleged that Hill committed a design breach by failing to include sufficient surge pressure margins and protections. As noted above, the surge pressure issue was fully briefed,[44/] no plausible basis for breach was found by the court in *Hill I*, and none of this was in the least surprising. All of the contracts were clear, and the County never demonstrated that a surge pressure under normal operating conditions exceeded that designed into the system.[45/] The County's postmortem assertions to the contrary are speculative.

(30) Hill is said to have breached its contract by failing to design surge protection facilities properly. There is no breach here, as noted above.

(31) It is alleged that Hill failed to consider and design for possible surges in the pipeline due to interacting pump stations. The surge pressure issue was discussed in detail in the *Hill I* briefing, including a discussion of how other components of the pipeline, such as meters, and other integrated parts were designed to operate below 150 psi.[46/] This speculative ground for breach was fully briefed and considered by the court in *Hill I*.

[44/] *Id.*

[45/] Initial Br. in *Hill I* at 9-12.

[46/] Initial Br. in *Hill I* at 60.

(32) It is alleged that Hill failed to forewarn that pump stations could cause damaging surges in the pipeline. There is no contract requirement to this effect, but of course the surge issue is based on the County's misconception of the required pressure rating, its failure to acknowledge that a proper surge factor was built into the system, and that there have never been any surges in normal operating conditions beyond that built-in surge factor during the 12 years plus that the pipeline has been in operation. All this was briefed and considered in *Hill I*.

(33) The County contends that the engineer failed to design or advise as to the need for surge monitoring instrumentation. The surge issue was fully briefed previously, as noted above. A separate surge analysis could have been offered as an additional Item D testing service under the Hill contract in order to analyze whether further monitoring instrumentation was necessary. The County never requested this service, and it performed all resident engineering tasks on its own.

(34) It is alleged that Hill breached its contract by failing to draft into the manufacturer's contract a requirement that it provide all test results performed under AWWA C-301-72. As previously noted, AWWA C-301-72 was a specification incorporated into the manufacturer's contract with the County. Its terms required that the purchaser obtain these test results from the

manufacturer. This requirement was, therefore, incorporated by reference in the manufacturer's contract with the County.

(35) It is asserted that Hill breached its contract by failing to require that the manufacturer present a certification of compliance as provided for by AWWA C-301-72. The County is wrong. That requirement is within the AWWA standard incorporated by reference in the manufacturer's contract with the County.[47/]

(36) It is asserted that Hill breached its contract by failing to provide a sufficient warranty of the manufacturer's work in its contract with the County. The *Hill I* briefing discussed at length that the County had a significant hand in reviewing and reformulating the "shelf" contract provided by Hill to the County, which was a working form usually intended for use by a general contractor for its agreement with the manufacturer.[48/] Obviously, the County attorney would have reviewed the contract and made any changes deemed appropriate when it modified this contract for its use and negotiated its concerns directly with the manufacturer.

47/ The County's Answer brief in *Hill I* (at page 21) acknowledged the incorporation of AWWA C-301-72 into the Interpace contract.

48/ The County acknowledged this by its silence on the point in the *Hill I* briefing.

(37) The County asserts that Hill breached its contract by failing to provide a "proper protection clause" for the County as recourse against the manufacturer for supply of a defective product. Once again, the County was obligated to draft and issue a contract that its lawyers deemed satisfactory under the circumstances. There was no breach by Hill.

(38) This allegation asserts that Hill breached its contract by failing to inform the County of the expected life of the pipeline. This obligation is nowhere encompassed in Hill's contract. Any "independent tort" claim has been foreclosed by *Hill I*.

(39) It is alleged that Hill failed to exercise due care in reviewing manufacturer's submittals for the project. The court has remanded this issue for retrial insofar as whether the submittals concerning wire wrapping were within the design criteria specified by Hill. In its *Hill I* briefing, Hill explained that there were 5 system-wide "manufacturing defects" which the County alleged to be in each and every pipe segment: (1) mortar coating that was too porous; (2) insufficient slurry encasing the wire wrapped around each pipe core; (3) improperly cured cement core; (4) improper materials (aggregates) used in core manufacture; and (5) defective wire used to wrap each pipe core.[49/] As noted in briefing then, Hill had

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[49/] Initial Br. in *Hill I* at 61.

no connection whatsoever to the first four of these alleged defects. It had no duty to oversee the manufacturing of the pipe segments or the manufacturing of their component parts. These oversight obligations were County duties and were not Hill's concern, as found in the *Hill I* decision. This court found that the wire wrapping issue was distinctive in that a fact question was raised as to whether Hill's design criteria improperly allowed the use of class IV wire. While in *Hill I* this issue was engulfed in the County's assertions of tort, merger and manufacturing oversight, the entire debate of whether the submittals met their design criteria was precisely before the court. The court rejected these other grounds for breach (other than as to wire) which were comprehended by the design specification and manufacturer's submittal process, by virtue of the parties' briefing in *Hill I*. Clearly, the other alleged pipeline-comprehensive defects were either manufacturing phase oversight responsibilities of the County or within its resident engineering tasks. The court has already laid this issue to rest.

(40) The County alleges that Hill allowed the manufacturer to manufacture "lesser quality pipe" than called for by specification. This was a manufacturing oversight responsibility of the County, not Hill. The issue has been foreclosed by *Hill I*.

(41) The County alleges that Hill failed to reject shop drawing submittals by the

manufacturer, including the ASTM A-648-73 specification for the manufacture of class IV wire. While Hill has already explained that the County's allegations of breach concerning approval of the ASTM A-648-73 standard is a non-issue, the issue forms part of the remand for re-trial as it pertains to the use of class IV wire.

(42) The County asserts that Hill failed to require the manufacturer to meet specifications of AWWA C-301-72 requiring the provision of wire and steel test specimens to the County. There is no Hill contract requirement calling for this. The manufacturer's contract, by incorporating the AWWA standard by reference, allowed for the County to receive these test specimens if requested by the County. Since that specification was within the manufacturer's contract, there was no Hill breach.

This exhaustive rebuttal to the 42 matters asserted by the County as contract breaches demonstrates that the County's view of what was unresolved by *Hill I* is unfounded. In the main, the County has merely reinvoked spurious claims that Hill was responsible for manufacturing oversight and resident engineering duties. Hill was not. Other alleged breaches are the product of speculation by the County, previously addressed and debunked by the issues extensively briefed and subsequently decided in *Hill I*.

d. The County's rehearing and clarification motion.

After the court issued its opinion in *Hill I*, the County massaged its intermingled theories of contract breach merger and oversight duties, but centrally urged the court to reconsider on the basis that Hill's contract was breached in myriad ways.[50/] The assertions there are the very assertions the County argues here.

The County's motion argued that it should be entitled on remand to try contract breaches other than with respect to class IV wire, despite the court's decision that all other contract claims are barred as a matter of law. The County's point could not have been more clear:

> In short, the panel's ruling that only one alleged breach -- Class IV wire -- is left in the County's contract claim against the Engineer overlooks numerous other breaches of the obligations the Engineer expressly assumed in its contract. *The panel's opinion should be*

50/ *See* County's rehearing and clarification motion in *Hill I* at pp. 9-12. The County's motion also took intensive issue with the court's disposition of the tort issues. *Id.* at 2-5.

clarified to make plain that the County may on re-trial pursue all of its claims of breaches of the Engineer's direct contract with the County.[51]

The court denied the County's motion. (PR. 163).

e. Law of the case requires affirmance of the trial court.

In Hill's initial brief and the documents that followed in *Hill I*, the court had before it an expansive explanation of the division of responsibilities between Hill and the County, based on the narrow set of contract duties assigned in the County's contract with Hill and actually undertaken by Hill. That division of responsibility *excluded* Hill from several permeating tasks -- manufacture and installation supervision, and testing, being foremost.

Under the doctrine of law of the case, the County has had its day in this court on the precise issues which are the subject of this appeal. The County's renewal of arguments previously made and rejected is improper. Reconsideration of a case "should never be allowed when it would amount to nothing more than a second appeal on a question determined in the first appeal." *Fischbach & Moore, Inc. v. McBro, a Division of McCarthy Bros. Co.*, 619 So. 2d 324 (Fla. 3d DCA 1993), citing to *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965).

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[51] *Id.* at page 12 (emphasis added).

A second appeal is all that the County is seeking. The scope of Items A through D in the Hill contract was thoroughly examined in the *Hill I* proceeding. The functions within those Items which Hill was specifically authorized to perform, and those which it was not authorized to perform, were either particularized in Hill's briefing or necessarily subsumed within its general discussion of contract terms and the County's responses in relation thereto. Additional responsibilities sought to be foisted on Hill by virtue of the merger of Interpace and Hill contracts, by assignment of manufacturing oversight duties, and by reference to duties arising from the County's role as resident engineer and contractor for the project, were rejected. Those are the very issues, re-appearing now in this appeal, that were decided by the court in *Hill I*.

The County admits that the proper test for "law of the case" preclusion encompasses not only issues raised and ruled on, but issues which are "implicit" in an appeal even if not expressly addressed in the appellate court's decision.[52/] The briefs of both parties determine what was raised and what was considered on appeal, of course. The range of raised, considered and implicitly determined issues goes well beyond the

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52/ County's Br. at 20. It is the traditionally-held view of the Florida courts that previous decisions of appellate courts which impliedly address or necessarily consider issues, even without particularizing them specifically, foreclose re-litigation of the substance of those issues. *See, e.g., Dade County Classroom Teachers' Ass'n, Inc. v. Rubin*, 238 So. 2d 284 (Fla. 1970), *cert. denied*, 400 U.S. 1009 (1971); *Sax Enterprises, Inc. v. David and Dash, Inc.*, 107 So. 2d 612 (Fla. 1958); *Alford v. Summerlin*, 423 So. 2d 482 (Fla. 1st DCA 1982).

County's narrow focus when the County's multiple arguments in *Hill I* are reevaluated. Indeed, a wider breadth is readily seen from just pages 3-4 of the County's answer brief in *Hill I*, which displayed for the court's consideration the complete panoply of issues which now appear in the chart on page 15 of its present brief.

In these regards, it is unnecessary that a legal point raised in the second appeal constitute a mirror image of that raised in the first appeal. Law of the case applies even to discourage visitation of points of law which *should have been* adjudicated in a former appeal, in order to lend stability and lack of fragmentation to the adjudicatory process. *Federal Deposit Ins. Corp. v. Hemmerle*, 592 So. 2d 1110, 1116 (Fla. 4th DCA 1991), *rev. denied*, 601 So. 2d 552 (Fla. 1992); *Valsecchi v. Proprietors Ins. Co.*, 502 So. 2d 1310 (Fla. 3d DCA 1987). Properly cast, all that the County has to commend its position to the court is a trenchant view that it deserves a second chance to present evidence of the same alleged range of issues it previously litigated. The County would treat the entire first appeal as being for nought -- a pyrrhic victory for Hill, and an exercise in futility for the court.

The cases cited by the County in an effort to elude "law of the case" are ineffective supports for its position. Each reflects the typical situation of a trial court's refusing to address issues on remand which were never disposed of by a first appeal.[53/] Indeed, the

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53/ See the cases collected at page 20 of the County's initial brief.

leading case identified by the County constitutes a classic *misapplication* of the doctrine by a trial court.

Two M Dev. Corp. v. Mikos, 578 So. 2d 829 (Fla. 2d DCA 1991), involved challenge to a property tax assessment on two alternative grounds: assessment of the property as substantially completed; or if it were properly assessed then statutory factors of assessment were not considered. The trial court had initially ruled that improvements to the property were not substantially completed, so that the assessor had overvalued the property. On a first appeal the district court reversed that determination. *Mikos v. Two M Dev. Corp.*, 546 So. 2d 1110 (Fla. 2d DCA 1989). On remand, the trial court refused to consider the alternative position of the property owner, to the effect that the statutory factors were ignored by the tax assessor. The district court reversed that restricted view of the "law of the case" in the second appeal. It was held that the court had neither explicitly nor implicitly considered the statutory factors issue, for it had never been determined by the lower court in the first instance. 578 So. 2d at 831. The court expressly noted that the statutory factors issue was made moot by the trial court's first ruling, so that neither the trial court nor the first appellate panel had ever considered that issue, even on rehearing in the first appeal. *Id.*

The County points to no fact or law made moot by the first trial or its oversized final judgment. Proof positive that all issues framed in this appeal were decided against the County in *Hill I* is the County's rehearing and clarification request, which expressly raised in the first appeal all conceivable points now represented.

f. There can be no "due process" or "access to court" denial in rejecting the County's claims.

The County argues in part that its constitutional right to due process, and its access to the courts, will be denied unless it can open up for retrial the multitude of matters which the court in *Hill I* foreclosed. The argument is emotional nonsense. No process or access rights have been impaired if the County had a trial and an appeal (which it did), and if the appellate court considered and rejected its contentions as legally improper (as it did). Access was fully availed of,[54/] process was amply provided,[55/] and the County simply did not prevail. The constitution does not guarantee a "win" to Pinellas County.[56/]

54/ The County had a year-long "day in court" on the issues it framed for trial.

55/ The appellate process was more than ample, given the expanded briefing rights, massive appendices provided, and the lengthened oral argument times.

56/ There is no lack of justice or process in denying the County a belated opportunity to replace its claims of tort breach with a new "contract" name. The County cannot have it both ways: first cloak all manner of breaches within two theories which lack factual and legal veracity, and then when unmasked cry "constitutional violation" in order to reintroduce them with a new *nom de plume*. *Compare Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla. 1988).

3. The County is in reality seeking a belated rehearing of the *Hill I* decision

The issue before the court in this appeal is really not whether the trial court followed this court's opinion and mandate, for clearly and unmistakably it did. Nor is the issue whether the court meant what it said in *Hill I*. Cutting to the core of the County's contentions, the issue here is whether the court should reconsider what it did in *Hill I*, for *that* is the undeniable challenge, unstated here, which the County has proposed.

The County made unmistakably clear to the trial court its dissatisfaction with the court's *Hill I* decision. It asserted, arrogantly, that the court's opinion and mandate could not possibly mean what they expressly said in light of the County's own knowledge of the evidence, and that the *Hill I* decision is "preposterous" if it has foreclosed issues other than the use of class IV wire.

> Frankly, it's a preposterous Opinion, it absolutely flies in the face of everything that we know about construction documentation, but that's what they have done.

(PR. 249-298; transcript of proceedings on Request for Clarification at p. 17).

Hill does not believe that the court's *Hill I* decision is preposterous, nor is it at odds with the *Hill* contract documentation on which the County must now travel. Given the record before the court when *Hill I*

was decided, the court's decision was rock solid, and eminently correct.

The County has presented the court with a completely improper, and jurisprudentially mischievous third attempt to find theories of liability against Hill.[57] That is, the County is simply asking the court to revisit and reverse the decision which was made initially on March 13, 1992, and then reaffirmed after reconsideration on May 19 of that year. The County's appeal is nothing more than an untimely re-rehearing of matters the court has already fully considered and rejected. As such, the County's position should be summarily dispatched. *Whipple v. State*, 431 So. 2d 1011 (Fla. 2d DCA 1983). *See also Parker v. Baker*, 499 So. 2d 843 (Fla. 2d DCA 1986), *rev. denied*, 506 So. 2d 1040 (Fla. 1987); *Jackson v. U.S. Aviation Underwriters, Inc.*, 466 So. 2d 1119 (Fla. 2d DCA), *dism'd*, 472 So. 2d 1181 (Fla. 1985).

In *Hill I*, the court both exhibited and acknowledged its careful analysis of the record on appeal in two significant respects. First, the court identified and quoted specific counts in the County's amended complaint: the one grounded in negligence and the other grounded in breach of contract.[58] In the course of performing its review function, the court also scrutinized the County's contract with Hill:

57/ The County pursued these theories both on the initial appeal and again in its motion for rehearing and for clarification.

58/ *Hill I*, 598 So. 2d at 88.

> Our reading of the Hill Contract, a function wholly within our scope of review, [citation omitted], has led us to the opposite conclusion [i.e., that Hill had no contract responsibility to oversee the manufacturer of pipeline segments].

Hill I, 598 So. 2d at 88-89.

The significance here is not that the court in fact read the relevant portions of the record, for that would always be the case. Rather, the significance for this appeal inheres in the fact that the court specifically addressed the relationship between the contract provisions which were alleged to be breached and the allegations of the County's complaint -- the County's so-called "construction documentation." The specificity of that comparative review is precisely why the County is wrong in decrying the *Hill I* decision as preposterous, and asserting that the court could not possibly have meant what it said.

Hill respectfully suggests that the court said precisely what it meant, and that the record on appeal and the arguments of the parties fully support the court's decisional recitation.

Conclusion

The determination of the trial court to allow retrial only on the class IV wire issue, in complete compliance with this court's *Hill I* decision and mandate, should be affirmed.

Respectfully submitted,

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/S/

(6)

No. 93-2071

In The
Supreme Court of the United States
October Term, 1993

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal, Second District, State of Florida

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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No. 93-2071

In The
Supreme Court of the United States
October Term, 1993

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The District Court Of Appeal, Second District, State of Florida

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Pinellas County (Pinellas) files this Reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari to review the judgment of the District Court of Appeal, Second District, State of Florida, entered on February 2, 1994 and the Order by the same court denying Pinellas' Motion for Rehearing and Rehearing En Banc entered on March 24, 1994. The opinions have been reprinted in a separate appendix to the Petition filed with this Court on June 21, 1994. (A: A, C) The same symbols referenced in the previous briefs will be referenced in this Reply.

REPLY

The Respondent, CH2M HILL SOUTHEAST, INC. (Hill), makes general nebulous statements in its Brief in Opposition to the Petition. Hill provides no support for the statements contained in its Brief. Hill claims that all the breaches of contract listed in the Petition by Pinellas were raised in the Initial Appeal to the Second District Court of Appeal of Florida ("Hill One"). (A: G) Hill is relying on the low percentage of certiorari petitions this Court grants to precipitate further injustice.

An examination of Hill's entire Brief filed with the District Court in Hill One confirms that only limited issues were raised on appeal. Hill alleged in Hill One the following:

> -The trial judge was required as a matter of law to disqualify itself;
>
> -Hill has no tort liability to Pinellas County because: Hill committed no tort independent of its contractual duties; Hill had no statuatory duties to the County; and the County presented no proof of damages sufficient to support a tort recovery.
>
> -Hill is not liable for breach of contract because: Hill had no contractual duty to inspect the manufacture of pipe segments; and Hill could not be held to a contractual duty under Pinellas County's contract with the pipe manufacturer through merger of the two separate documents;
>
> -Hill did not breach its contract in relation to the pipe manufacturer's use of class IV wire in pipe segments; and Hill did not breach its contract in relation to pipeline pressure;
>
> -The trial court exceeded its authority in awarding the damages equal to the cost of replacing the entire pipeline with improved components.
> (H: 2; 29-90)

A review of the arguments contained in Hill's Initial Brief confirms that Hill never briefed the District Court on the numerous breaches of contract specifically addressed in the Complaint and the final judgment entered by the trial court, including, but not limited to:

-Hill breached its contract by approving use of 17-gauge steel instead of 16-gauge steel. The submittal should have been rejected on this basis. (R:4)

-Hill breached its contract for not inspecting the manufacturing plant on an average of four (4) times per month; (R:4)

-Hill breached its contract by not advising Pinellas to have full time or part time inspectors at the pipe manufacturing plant; (R:4)

-Hill breached its contract by improperly designing and placing into the pipes vacuum relief valves. As a result of the improper design and placement, the pipes were filled with putrid ground water, contaminating the water supply pipeline, which supplies water to the entire county. (R:4)

Hill's statement that all of Pinellas' well-pled breaches of contract were brought before the District Court is contradicted by Hill's own Brief filed in Hill One (H: G) This completely impeaches Hill's credibility. If such a statement were true, then there can be no doubt that this Court could line up all of the breaches set forth in the Petitioner's First Amended Complaint (A: M; 24-30), which have been listed by number on pages 5-9 of the Petition, with Hill's Brief filed with the District Court, and find each breach identified. For example, item 30 on page 7 of the Petition states "Hill breached the contract by failing to design the surge protection facilities properly which were provided, specifically, defective air and vac-

uum-valve assemblies. This same allegation is alleged in the First Amended Complaint. (A: M; 28) However, a thorough review of Hill's Brief evidences that nowhere has Hill addressed the breach of contract allegations relating to the defective air and vacuum-valve assemblies. (H: 2) Another example is found in item 19 on page 6 of the Petition, which states "Hill breached the contract by certifying completion of the project without receiving affidavits and certifications of compliance." This allegation is contained in the First Amended Complaint (A: M; 26), but is never addressed by Hill in its Brief. (H: 2)

Rule 9.210, Fla.R.App.P., which abolished assignment of errors, requires that counsel specify in the initial appellate brief the alleged errors committed. Hill identified in its Brief those particular items it was appealing. However, as evidenced by the examples set forth above, the Initial Apellate Brief filed by Hill did not request review of numerous well plead contract actions of Pinellas. If this Court agrees that these breaches were not presented to the District Court, then the appropriate relief is to summarily dispose of the opinion of the District Court. If the issues were not raised on appeal, then at the time of re-trial, those issues are still before the lower court. See Two M Development Corp. v. Mikos, 578 So. 2d 829 (Fla. 2d DCA 1991). See also, Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939); and Gertz v. Robert Welch, Inc., 680 F. 2d 527, 533 (7th Cir. 1982), cert. den., 459 U.S. 1226 (1983).

Hill also alleges that Pinellas' Petition " . . presents no valid claim under the United States Constitution, as Hill Two decision is a fact-bound determination which is substantively grounded in state law concepts."(H 2) No case law is presented by Hill to support this position. Hill makes a statement and simply asks the Court to "go along with it." This style of legal reasoning continues throughout the entire Brief in Opposition. It is impermissible. If there did exist case law to support this position Hill would have surely cited it to this Court. Hill argues that the District Court's opinion is " . . fully supported by Florida's law of the case doctrine: a clearly delineated, independent state law ground that was presented

by the County and argued by both parties. (H 10) Again, Hill fails to cite any case law that supports this statement. The reason for that is because none exists. If it did, Hill would presumably want to share it with all of us.

Hill represents to this Court that "[t]he County's allegations of contract breach by Hill were contained in a one-sentence Count of the complaint which merely incorporated by reference the twenty-two, detailed tort allegations contained in another count of the Complaint. " (H 3) This is not an accurate description of Pinellas' breach of contract allegations contained in the Complaint. A review of the First Amended Complaint, (A M:30), evidences that the breach of contract allegations consisted of much more than a mere sentence. Hill fails to recognize that Pinellas incorporated by reference allegations contained in paragraphs one through fourteen, along with those allegations contained in the negligence count in paragraphs sixty-four through sixty-seven. These allegations were incorporated rather than reciting them for a second time, in order to lessen the burden upon the trial court and opposing parties. This is just one of the many "red herrings" raised by Hill in its Brief.

Hill also suggests that Pinellas acted inappropriately by preparing a proposed final judgment, which was ultimately entered by the trial court. (H 3-4) It is unknown to Pinellas why Hill believes that this is relevant to the constitutional issues raised in Pinellas' Petition. There is no reason for Hill to bring this frivolous argument to the Court's attention. Moreover, throughout the history of this action pending before the trial court, counsel on all sides have repeatedly been asked to submit findings of fact and conclusions of law on matters that came before the trial court. Submitting proposed orders and judgments is part of any attorney's responsibility as an officer of the Florida courts. See Rule 1.080(h)(1), Fla.R.Civ.P. Hill fails to inform the Court that it too prepared a proposed final judgment. This is just another "red herring" raised by Hill in its Response Brief.

Hill alleges several times throughout its Brief that Pinellas is seeking a review of the "Hill One" decision. Hill is obviously aware that it asked the District Court to address

this very issue pursuant to a Motion to Dismiss filed by Hill. (R: 2) The District Court denied Hill's Motion to Dismiss. (R: 3) The District Court allowed the parties to proceed to fully brief the issues raised by Pinellas and also held oral argument. Therefore, it is academic that the District Court did not consider these issues raised in Pinellas' appeal to be identical to those previously addressed by the District Court in Hill One.

Hill claims that Pinellas " . . appealed the trial court's partial final judgment to the Second District on the ground that the Second District's opinion in Hill One had improperly restricted the issues on re-trial. " (H 6) This is a completely inaccurate statement. Not until the trial court interpreted the mandate of the District Court on March 3, 1993, was Pinellas put on notice that it would not be allowed to proceed forward on any of its claims of multiple breaches of contract. (A: D) It was at this moment in time that the courthouse doors were slammed shut on Pinellas.

Pinellas has filed this Petition because the trial court and the District Court refused to acknowledge Pinellas' constitutional right to be heard on well-pled breach of contract allegations. Pinellas has been denied the right to bring well-pled breaches of contract actions against Hill, without ever having been given the opportunity to be heard. (A: A, C, D, F) The breaches raise factual issues that cannot be decided by the District Court. See, Prevatt v. Prevatt, 462 So. 2d 604 (Fla. 2d DCA 1985); Williams, M.D. v. Dolphin Reef, Ltd., 455 So. 2d 640 (Fla. 2d DCA 1984). Hill's argument that the District Court somehow summarily disposed of these issues without Hill appealing these breaches is without merit. Pinellas has been denied it's fundamental constitutional right to bring well-pled breach of contract allegations before a trier of fact.

Hill attempts to divert this Court's attention from the true issues at hand by erroneously asserting that the previous appeal addressed these very same issues. Hill is guilty of merging all the decisions together as being one in the same.

As a result, Hill is falsely simplifying the issues. Hill is hoping that it can survive this action unscathed if this Court does not look at the specific issues raised by Hill on appeal in the Hill One appeal (H: G;2) versus the numerous well-pled contract issues raised by Pinellas County.

Hill claims that the denial of rehearing from the District Court and the denial to grant discretionary review by the Florida Supreme Court evidences the lack of merit of Pinellas' arguments contained in this Petition. Hill fails to acknowledge that a denial of a motion for rehearing by the District Court is nothing more than the District Court's recognition that it's opinion in Hill One addressed all issues appealed. Malsby, et al v. Gamble, 54 So. 2d 766, 773 (Fla. 1911); Christy, et al v. Burch, et al., 6 So. 857 (Fla. 1889). The Florida Supreme Court declined to accept discretionary review because of jurisdictional reasons. It never reached the merits of the case. Rule 9.120., Fla.R.Civ.P. (R 1)

Hill wants to persuade this Court that the District Court addressed all of the well-pled breaches as a manufacturing oversight duty. (H 11) This is an obvious misrepresentation of the multiple contract allegations set forth in the First Amended Complaint. (A: M 2-30). Hill's reliance on the limited subject of the "manufacturing oversight duty, "and the District Court's ruling on this limited issue surely does not resolve all the other breach of contract allegations. (H 11) The manufacturing duty is only a minor portion of the duties Pinellas alleges that Hill owes under the terms of the Engineering Agreement. (A:H; 16-30) A review of the Engineering Agreement confirms that there are multiple duties that Hill was held responsible for under the terms of the Agreement. (A: H 16-30) The trial court's final judgment found Hill liable for the numerous breaches under the terms of the Engineering Agreement, which included those listed in the Petition. (R: 4)

Pinellas is urgently requesting this Court to reconsider the breach of contract allegations. Specifically, Pinellas is asking this Court to determine whether its fundamental consti-

tutional rights to be heard have been denied as to all of the other contract issues, excluding the "...duty to inspect the manufacturing of the pipe. " (H 11)

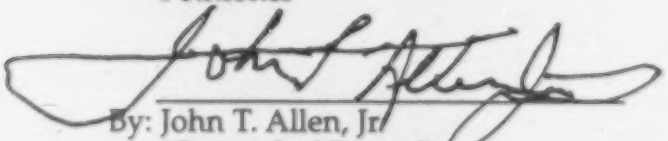
Not surprisingly, Hill makes light of the case law which Pinellas relies upon. Yet, absent from Hill's Response Brief is any case law which confirms that a court has the right to dispose of well-pled allegations without ever providing any opportunity to be heard. Hill "tap dances" around this very crucial issue by again simply making light of the decisions of this Court and other courts across this country cited in the Petition. Hill brushes over the substantive issues that have been raised in the reported opinions presented to this Court by the Petitioner. This is the approach that Hill has taken throughout its entire brief, failing to ever get to the meat of the issues presented in the petition.

Pinellas strongly urges that the District Court's opinion and the trial court's decision, disposing of breaches of contract allegations, without providing Pinellas an opportunity to be heard, is a violation of Pinellas' fundamental constitutional right of access to the courts and the right to be heard, as protected by the Fourteenth Amendment of the United States Constitution. The decisions cited in the petition clearly state that a civil litigant has a fundamental right to be provided a forum to be heard.

CONCLUSION

Hill's Brief in Opposition contains statements unsupportable by the record in the state court action. This is confirmed by Hill's failure to reference sufficient record citations. Hill makes very grandiose statements that simply are not compatible with the record produced in the state court proceedings. At the same time, Hill never addresses "head-on" the questions presented in the Petition. Hill never cites to this Court evidence that shows that even a reasonable number of breach of contract claims raised by Pinellas in its Complaint were addressed in the initial appeal before the District Court. For these reasons, Pinellas County requests that certiorari be granted and the appropriate order be given summarily disposing of the Second District Court of Appeal's Decision entered on February 2, 1994. (A: A)

Respectfully submitted,
PINELLAS COUNTY, FLORIDA
Petitioner



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September, 1994

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Appendix 1

Supreme Court Of Florida

Monday October 12, 1992

PINELLAS COUNTY, FLORIDA, CASE NO. 80,056

Petitioner,

v.

DISTRICT COURT OF APPEAL,
2ND DISTRICT NO. 90-02027
90-02028
90-03562
90-03563

CH2M HILL SOUTHEAST,
INC., ET AL.,

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur

BH

cc: Hon. William A. Haddad, Clerk
Hon. Karleen F. DeBlaker, Clerk
Hon. Fred L. Bryson, Judge
Alan C. Sundberg, Esquire
Sylvia H. Walbolt, Esquire
John T. Allen, Jr., Esquire
Michael J. Keane, Esquire
Jeffrey S. O'Brien, Esquire
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Joseph M. Mathews, Esquire

Appendix 2

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

PINELLAS COUNTY, FLORIDA,

Plaintiff/Appellant,

v. Case No. 93-01203

INTERFACE CORPORATION; CLEVEPAK CORPORATION; MADISON MANAGEMENT GROUP, INC., as successor of INTERPACE CORPORATION; and CH2M HILL SOUTHEAST, INC.,

Defendants/Appellees.

_____/

MOTION TO DISMISS APPEAL

CH2M HILL SOUTHEAST, INC. ("CH2M HILL"), by and through its undersigned attorneys and pursuant to Fla.R.App.P. 9.300, hereby moves this court for an order dismissing the appeal filed by Pinellas County, Florida ("Pinellas County").

On April 1, 1993, Pinellas County filed a notice of appeal directed to a final partial judgment entered in favor of CH2M HILL and an order denying Pinellas County's motion for rehearing with respect to the final partial judgment. (A. 1, 2)l This court is without jurisdiction to review the partial judgment because it is not a final order. Accordingly, the appeal should be dismissed.

I. Background

In the underlying action, Pinellas County sued CH2M HILL in tort and contract for CH2M HILL's allegedly-improper performance of engineering services with respect to the design and construction of a water transmission main in Pinellas County. (A. 44-53) CH2M HILL successfully appealed an adverse judgment to this court; this court's opinion is found in CH2M Hill Southeast, Inc. v. Pinellas County, Florida, 598 So. 2d 85 (Fla. 2d DCA 1992). (A. 3) After this court rendered its opinion in CH2M HILL, Pinellas County unsuccessfully requested this court to rehear and clarify this opinion (A. 8-20, 21) and then unsuccessfully requested the Florida Supreme Court to invoke its discretionary jurisdiction to review the CH2M HILL opinion. (A. 22-41, 42) This court issued its mandate on June 8, 1992. (A. 43)

In the CH2M HILL opinion, this court held that "...Hill is entitled to judgment as a matter of law on all issues save one, and the new trial as to Hill shall be limited to the one issue dealt with below." 598 So. 2d at 88. That issue was Pinellas County's assertion that Hill had breached its contractual design responsibilities by allowing the pipe manufacturer to use class IV wire for the pipeline. 598 So. 2d at 89.

In its mandate, this court instructed the trial court as follows:

> You are hereby commanded that further proceedings be had in [this] cause in accordance with the opinion of this court and with the rules of procedure and laws of the State of Florida.

1 All references to the record will be referred to as (A.) followed by the appropriate citation to the page number of the appendix.

(A. 43) On March 3, the trial court entered its final partial judgment in favor of CH2M HILL in accordance with the CH2M HILL opinion and this court's mandate. It is that partial judgment, and the court's order denying rehearing of that judgment, which are the subject of this appeal.

II. The partial judgment and order denying rehearing are not final orders.

A final order is generally defined as an order which brings an end to the judicial labor in the cause and terminates the cause as between the parties. Pruitt v. Brock, 437 So. 2d 768 (Fla. 1st DCA 1983). The present case remains pending between Pinellas County and CH2M HILL at the trial level and judicial labor has not come to an end. Because of this, the partial judgment is not a final order. In addition, the partial judgment does not fit within any of the exceptions to the general definition of a final order. The partial judgment in question does not dispose of a separate and distinct cause of action which is not interrelated with the remaining portion of the case pending in the trial court. Mendez v. West Flagler Family Association, Inc., 303 So. 2d 1 (Fla. 1974); S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97 (Fla. 1974).

In Szewczyk v. Basshore Properties, 456 So. 2d 1294, 1296 (Fla. 2d DCA 1984), this court examined the following three criteria in determining whether a partial judgment was final and appealable:

1. Could the causes of action dismissed be maintained independently of each other?

2. Were one or more parties removed from the action when the partial judgment was entered?

3. Are the counts separately disposed of based on the same or different facts?

See also McClain Construction Corp. v. Roberts, 351 So. 2d

399 (Fla. 2d DCA 1977). Under these tests, the partial judgment and order denying rehearing are not final orders.

The partial judgment in favor of CH2M HILL implements this court's decision to rule adversely to Pinellas County on all claims asserted by Pinellas County except the single issue remanded to the trial court for re-trial. The issue remanded for retrial was Pinellas County's allegation that CH2M HILL breached its contractual design responsibilities by allowing the pipe manufacturer to use class IV wire for the pipeline.

This allegation is set forth in Count X of Pinellas County's First Amended Complaint (the contract count) at paragraphs 69 and 70. These paragraphs incorporate paragraph 66 from Count IX (the negligence count, which this court disposed of in the CH2M HILL opinion), and all of its subparts by reference. (A. 44-53)

Counting paragraph 66, Count X contains 20 paragraphs setting forth numerous theories as to how CH2M HILL allegedly breached its contract with Pinellas County. The trial court's partial judgment does not dispose of Count X in its entirety but, rather, disposes of all but one of Pinellas County's theories of how CH2M HILL breached its contract. The breach of contract count survives the partial judgment; it merely survives in a more limited scope.

All three of the Szewczyk criteria and the Pruitt test suggest that the partial judgment is not "final." First, the partial judgment did not "dismiss" any cause of action; it merely limits the scope of the breach of contract cause of action that remains. Second, no parties were removed from the action when the partial judgment was entered. Third, the partial judgment did not separately dispose of any count what soever, much less one that was based on "different facts." As described above, the partial judgment simply narrowed the breadth of the breach of contract count that survived the first appeal of this action.

With reference to Pruitt, the partial judgment did not bring an end to the judicial labor; it simply reduced the scope of the court's labor. Further, the partial judgment certainly did not terminate Pinellas County's contract cause of action, and is thus not a final order under Pruitt.

III. Because the partial judgment and order denying rehearing are not "final orders," this court does not have jurisdiction.

Because the partial judgment does not dispose of a separate and distinct cause of action which is not interrelated with the remaining portions of the case, this court lacks jurisdiction at this time to review the partial judgment. Mendez, supra. This court has repeatedly dismissed similar appeals from non-final orders. See, e.g., Department of Corrections v. Ratliff, 552 So. 2d 302 (Fla. 2d DCA 1989); Taddie Underground Utility Company Inc. v. Sloan Pump Company, Inc., 497 So. 2d 701 (Fla. 2d DCA 1986).

In sum, this court lacks jurisdiction to review the partial judgment because that judgment does not completely dispose of the case with respect to either CH2M HILL or Pinellas County and does not involve the complete dismissal of a count. Rather, the partial judgment disposes of portions of a count whose facts are interrelated to the remaining cause of action. Accordingly, under clear precedent from the Florida Supreme Court and the Second District, appellate jurisdiction is not present. See also Levine v. Forrest, 578 So. 2d 458 (Fla. 3rd DCA 1991); Boca Grande Property Owners Association, Inc. v. Boca Development Associates., Inc., 570 So. 2d 1091 (Fla. 4th DCA 1990); Mimms v. Cassidy, 550 So. 2d 162 (Fla. 1st DCA 1989); Clermont Builders Supply, Inc. v. General Construction and Design, Inc., 423 So. 2d 518 (Fla. 5th DCA 1982).

WHEREFORE, CH2M HILL respectfully requests that this court enter an order dismissing Pinellas County's appeal for lack of jurisdiction and granting such further and additional relief as this court deems appropriate.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Michael J. Keane, Esquire, Baynard, Harrell, Mascara, Ostow & Ulrich, P.A., P.O. Box 180, 100 Second Avenue South, #1202, St. Petersburg, FL 33731 and John T. Allen, Jr., Esquire, 4508 Central Avenue, St. Petersburg, FL 33711, this 16th day of April, 1993.

_____

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Attorneys for CH2M HILL SOUTHEAST, INC.

Appendix 3

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

MAY 21, 1993

PINELLAS COUNTY, FLORIDA,)

Appellant(s),

v. Case No. 93-01203

INTERFACE CORPORATION, et al.,

Appellee(s).

BY ORDER OF THE COURT:

It is ordered that the motion to dismiss filed by appellee CH2M Hill is hereby denied.

Appellant's request for judicial notice, motion to recognize record from prior appeal, to shorten time and to supplement record on appeal with appendix is hereby granted. Appellant shall submit the post mandate record through the clerk of circuit court.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Michael J. Keane, Esq.
John T. Allen, Jr., Esq.
Benjamin H. Hill, III, Esq.
Karleen DeBlaker, Clerk

VIII.

ACTION OF PINELLAS COUNTY AGAINST CH2M Hill

A. FINDINGS OF FACT

Pinellas County sued CH2M Hill (also hereafter the "engineer") for breach of contract and negligence in violating the various duties assumed by CH2M Hill as specified in the contract between Pinellas County and CH2M Hill (hereafter CH2M Hill contract) of March 24 1975 834 and the contract between Interpace and Pinellas County hearafter Interpace contract) dated December 16, 1976.835 The Court has already ruled that both contracts had to be read together and that the duties assigned in both of the contracts to CH2M Hill were the legal obligations of the engineer.836 CH2M Hill drew both contracts and was said to draw the Interpace contract.837 CH2M Hill assumed certain duties and responsibilities and rights in the Interpace contract and now cannot be heard to object when Pinellas County complains that CH2M Hill failed in complying with its duties and obligations under the Interpace contract. From the testimony in evidence, both Pinellas County and Interpace properly assumed during the construction of the pipe that CH2M Hill had the authority and duties granted by itself to itself as engineer in the Interpace contract. If CH2M Hill was not performing such duties then this means that no one was performing the engineering duties necessary to protect the County from the construction of a defective pipeline.

As previously ruled, when both contracts and the national standard AWWA C301 are read together the duties assumed in the CH2M Hill contract are consistent with the duties assumed in the Interpace contract and are ones normally performed by the consulting engineer when operating under AWWA C301.838

The Court will construe the intent of the contract terms of both contracts in light of the surrounding circumstances and the application of the duties of an engineer under the national standard. If there are two possible constructions of the various clauses in these contracts the Court will construe the provision against the drafter of both agreements, CH2M Hill. 839

B. CH2M HILL'S OBLIGATION WAS TO MAKE SURE THAT INTERPACE CONSTRUCTED THE PIPE ACCORDING TO SPECIFICATIONS IN ORDER TO PROTECT PINELLAS COUNTY.

At the time CH2M Hill acted as Pinellas County's engineer it had been the only engineering firm serving the County for many years in the past. 840 CH2M Hill did all the work for the County. 841 The County did not possess the technical expertise to design, interpret tests, inspect pipe construction sites or do any of the actual engineering work necessary to protect the County against defective design or manufacture of prestressed concrete pipe. 842 In the preamble to the CH2M Hill contract the engineer represents that it has total expertise in environmental engineering which includes the design and construction of prestressed concrete pipe and pipelines. 843 The protective engineering services listed in the contracts were definitely intended to be assumed by CH2M Hill who was, under Item B(4) of the CH2M Hill contract, required to act as Pinellas County's representative and "judge the performance" of Interpace's compliance with the specifications.844 CH2M Hill had the authority to "issue all instructions" for the County to Interpace.845 The engineer could direct Interpace to stop work and "require special examination and testing of the work".846 CH2M Hill was to recommend final acceptance of "the construction work" at the end of the project847 as well as approve pay estimates as the work progressed. If it was not the intent of the parties that CH2M Hill was to protect the County from improper manufacturing of the pipe by Interpace then the charge to "judge the performances" under the contract documents which

included the plans and specifications or to recommend final acceptance, would not have been written into the contract.848 There is no other way CH2M Hill could have performed their agreed tasks without taking on the full responsibility of monitoring Interpace's manufacture of the prestressed pipe.

The pertinent provisions of Section B of CH2M Hill's contract provides:

> 1. An average of 4 visits per month to the construction site during construction to determine if the work is proceeding in accordance with the Contract Documents. By means of these visits the Consulting Engineers will endeavor to protect the Owner against defects and deficiencies in the work of the contractor. This shall not imply guarantee of the contractor's performance.
>
> 2. Check shop drawings and descriptive data submitted by the contractor as to general conformity to the plans and specifications.
>
> 3. Approval of pay estimates.
>
> 4. Consult and advise with the Owner act as the Owner's representative, issue all instructions of the Owner to the contractor, prepare routine change orders as required and act as interpreter of the terms and conditions of the Contract Documents and judge the performance thereunder. Whenever the Consulting Engineers consider it necessary or advisable to effect proper carrying out of the intent of the Contract Documents, they may, as the Owner's representative, direct the contractor to stop work or require special examination or testing of the work.
>
> **********
>
> 6. Following a final inspection with the Owner's rep-

resentative, representatives of any governmental agencies having jurisdiction, and representatives of the contractor, recommend as to final acceptance of the construction work.

The word "contractor" as used in the above provisions means "Interpace".849 The term "contractor" in Section 1.2.2 of AWWA C301-72 is defined as the corporation furnishing the pipe and fittings according to the standard. CH2M Hill denies that the engineers' duty was to make sure Interpace properly constructed the pipe;850 however, it freely admits that it actually did check the shop drawings submitted by Interpace under paragraph 2(B) of the CH2M Hill contract.851 Therefore, the word "contractor" as used in paragraph 2(B) - "check shop drawings and descriptive data submitted by the contractor" must mean Interpace852 in paragraph 2(A). It follows that the word "contractor" must mean Interpace in all other paragraphs of the agreement as well. This contract does not define the word "contractor" in any of its provisions. At best the provisions are ambiguous and legitimately capable of being construed two different ways and are, therefore, construed against CH2M Hill. This interpretation means that CH2M Hill's duties "during construction" were: to visit the Lacoochee plant an average of four times per month to determine if the manufacturer's "work" was proceeding in accordance with the specifications ("Contract Documents"); by means of these visits to the manufacturing plant "to protect the County against defects and deficiencies in the work" of Interpace;853 judge the performance of the work of Interpace under the specifications;854 recommend acceptance of Interpace construction work both during construction and upon final conlpletion.855 CH2M Hill denies these obligations856 because the pipe was obviously not constructed according to specifications and the County was not protected. CH2M Hill contends that when its contract was drawn the County had not determined to contract directly with a pipe manufacturer and other contractors and so, therefore, the work would have been done by a corporation who would have bought the pipe from the manu-

facturer and completely installed the pipe.857 Therefore, "contractor" did not mean the pipe manufacturer.858 Whether this is true or not CH2M Hill did not seek any amendment to its contract with the County before or after it drew the Interpace contract.859 It is, therefore, a finding of fact that both CH2M Hill ano the County intended CH2M Hill's engineering agreement to be read in the context of the contractual relationships and duties asuumed by the County, CH2M Hill, and Interpace when the Interpace contract was signed.860 If this were not the intention of CH2M Hill it would not have written into the Interpace contract engineering duties which are consistent with the word "contractor " being interpreter as Interpace in CH2M Hill's contract with the County.

Reading the two contracts together the obligations of CH2M Hill in the Interpace contract requires CH2M Hill to make sure that Interpace constructed the pipe according to specifications. In Interpace's contract the term "engineer" is defined as "CH2M Hill" (BC&E) - "acting for owner" Pinellas County.861 CH2M Hill is to approve "materials to be delivered" in the Interpace contract which states as follows:

C-01 AUTHORITY OF THE ENGINEER:

> A. The engineer will certify invoices for payment, approve or disapprove schedules, working drawings and shop drawings and approve or disapprove materials to be delivered.

The above provision requires CH2M Hill to approve the component parts and the manufacturing process and pipe "to be delivered" by Interpace.862 This provision is entirely consistent with CH2M Hill's being at the Interpace construction site at Lacoochee an average of four times per month acting as the Pinellas County's representative "to protect" Pinellas County "against defects and deficiencies in the work" of Interpace.863 Additionally, consistent with this interpreta-

tion is the provision in Interpace's contract for the engineer to "reject" - "defective material" - "when not in accordance with the plans and specifications" and require replacement.864 Section C-03 of the Interpace contract further provides:

> "**Failure to reject any defective materials shall not in any way prevent later rejection when such defect is discovered. Such failure shall not relieve the supplier of his obligations to fulfill his contract, even though such materials may have been previously inspected by the engineer and accepted or estimated for payment, nor shall it obligate the owner to final acceptances, or prevent the owner at any tine subsequent from recovering damaged materials shown to be defective".

If the engineer did not intend to assume the overseeing of Interpace in the construction of the pipe then the authority to reject the materials or the phrase "even though such materials have been previously inspected by the engineer and accepted or estimated for payment" would not have been written into Interpace's contract.865

In Section C-03(a-2) of the Interpace contract the engineer is even given the right to accept minor imperfect materials. Paragraph 6 on page C–3 (Rev.) of Interpace's contract provides for CH2M Hill to have the right to inspect at the manufacturing plant site and for the "engineer" (not the County) to conduct such "inspections and tests" as the engineer may require:

> 6. To permit a representative of the County and/or its engirleer, at all reasonable tines, to inspect the work and progress, or any of the materials used or to be used in connection therewith, and shall furnish promptly, without additional charge, all reasonable facilities, labor and materials deemed necessary by the

engineer, for the conducting of such inspections and tests as he may require.

The Court finds that all of the provisions when taken together are totally consistent with CH2M Hill's assuming the duty to make sure that Interpace constructed the pipe according to specifications and to protect the County and monitor the Lacoochee plant with full authority to approve materials, reject materials, accept minor defects, and conduct whatever tests were necessary to meet this obligator.866

C. CH2M HILL WAS RESPONSIBLE FOR INTERPRETING AND PASSING ON TESTS OF COMPONENT PARTS IN THE PIPE MANUFACTURING PROCESS

The engineer specified that Section 1.9 tests of AWWA C301 of concrete and steel be supplied to the engineer.867 On page 01010-3 of the Interpace contract all results of tests were to be supplied to the engineer. These tests are customarily supplied to the engineer prior to or during production so that the making of defective pipe may be stopped.868 In subsection (b) of C-03 of the Interpace contract, Interpace was to furnish tests satisfactory to CH2M Hill that "the materials and finished" pipe have passed the required tests prior to delivery:

> (b) INSPECTION AND TESTING OF MATERIALS: When not otherwise specifically provided in the specifications, the inspection and testing of materials and finished articles to be incorporated in the work shall be made by commercial bureaus, laboratories or agencies approved by the engineer, and the cost of such inspection and testing shall be paid by the supplier. The supplier shall furnish evidence satisfactory to the engineer that the materials and finished articles have passed the required tests prior to delivery, and shall promptly

remove from the delivery site any rejected materials or articles. (Emphasis supplied.)

In Section 1.9.6 of AWWA C301-72 the expense of the tests are to be borne by the manufacturer consistent with almost the identical language as is contained in subsection (b) of Section C-03 of the Interpace contract quoted above. Both contracts have the specific provision that the engineer CH2M Hill is acting for Pinellas County.869

CH2M Hill contends it did not have the responsibility of reviewing the tests of concrete and wire prior to Interpace's production of the pipe870 for the obvious reason that although the tests were required to be submitted prior to production no such tests were submitted or reviewed.871 The wire and concrete were permitted to be used with no check or balance or protection of the County.872 CH2M Hill's position must be rejected. The provisions in the CH2M Hill contract alone impose this obligation. Through the visits to the plant CH2M Hill was to protect against defects and deficiencies in the pipe. Without tests of the concrete or mortar mix or wire mill tests (since the wire was not made at Lacoochee but Solon) no protection could have been afforded the County.873 CH2M Hill had to review these types of tests to do its job.

In Item A(1) of the CH2M Hill contract, CH2M Hill agreed to "consult" on "laboratory tests and inspection of samples or materials" and "act as the Owner's representative in connection with any such services". The Court must ask the rhetorical question - what "laboratory tests and inspection of samples or materials" is the contract describing if not those of the pipe manufacturer?

CH2M Hill contends that paragraph A(1) of the CH2M Hill contract simply means advise as to the necessity of such tests.874 The Defendant overlooks the inclusion of the word "and" which means "also", in the phrase "provide consultation and advice as to the necessity of providing", etc. CH2M Hill was to "consult" as well as "advise". Even

without the provision the intent to have the engineer pass upon the pipe manufacturer's tests is obvious from the other contract provisions.875

D. THE DUTY TO DESIGN THE PIPELINE, CHECK SHOP DRAWINGS, AND PROVIDE SPECIFICATIONS

CH2M Hill's does not contest the fact that CH2M Hill was to prepare a complete basis for design876 of the pipeline. They do not contest that it was CH2M Hill's responsibility to approve Interpace's submittal sheet877 which included Interpace's specifications as to what materials it intended to use in pipe production, including Class IV wire, in the manufacture of the pipe and the individual pipe design formulas for each of the various pipes (54" and 60") to be delivered to construct the pipeline. There is some semantic dispute as to whether or not the submittal sheet and its standards and formulas was to be "approved" or "reviewed" for compliance with the specifications.878 Section 3-01of the Interpace contracts provides that the engineer will "approve" shop drawings. The Court finds that the duty of CH2M Hill under both contracts was to approve the shop drawings, specification sheet submitted by Interpace to the engineers, and the pipe design formulas.879 In fact, Mr. Henderson, an engineer for CH2M Hill, who wrote "reviewed" on the front of the submittal sheet concedes that he at least, in part, reviewed the design formulas and numbers supplied by Interpace on the submittal sheet.880

Pinellas County has charged CH2M Hill with breach of contract and negligence in improperly reviewing the submittal sheet, shop drawings and design formulas and approving them. At issue is the approval of Class IV wire, use of 17-gauge steel instead of 16-gauge steel, approval of the initial and resulting mudular ratios and creep factor, and failure to check prior Interpace jobs using Class IV wire from the Experience List submitted by Interpace. The Court will determine whether such breaches occurred or the engineers fell

below the standard of care as to each of these items.

CH2M Hill admits to the duty of being required to draw the specifications.881 Pinellas County claims breach of contract and negligence in not providing a "complete" basis for design in CH2M Hill's failure to specify, as one of the elective tests to be supplied by the manufacturer, the reports specified in Section 2.4 of AWWA C301-72 which if specified would have required submittal by Interpace of samples of fine and coarse aggregate.882 CH2M Hill is also charged with breach of contract and negligence in not inquiring or determining in advance whether admixtures were being used.883 See Section 2.6 of AWWA C301-72.

There is some dispute as to whether or not CH2M Hill was to determine before drawing the specifications whether the pipe should be epoxy or cold tar coated. No cold tar epoxy coating was specified by CH2M Hill.884 Therefore, if the pipe is determined to have required coating this element of damage will be the sole responsibility of the engineer. The Court finds that preparation of a complete basis of design required the engineer to determine whether or not the pipeline should be cold tar epoxyed.885 It will be up to the Court to determine whether such breach occurred or the engineer fell below the standard of care in not specifying that the pipeline be coated.

E. CH2M HILL BREACHED ITS CONTRACTUAL OBLIGATIONS TO PROTECT PINELLAS COUNTY FROM THE MANUFACTURE OF A DEFECTIVE PIPELINE

Since BC&E had in the past exclusively served as Pinellas County's engineer it was actually aware of the strategic importance of the 60" and 54" pipeline as was Pinellas County.886 The engineers who worked on the project acknowledged this fact in their testimony.887 The theme of the whole contractual arrangement was "to protect the Count ".888 The Water Director of Pinellas County at the time the project was initiated stated that CH2M Hill engineers were

very aware of the importance of the pipeline and the engineers were to do whatever it took "to protect the County".889 It is obvious that drafting proper specifications, selection of the proper pipeline route, preparing a complete basis for design, and determining whether the pipe was to be coated were all directed towards CH2M Hill's acting as Pinellas County's "representative" to oversee the pipeline construction and approve pay estimates as the project progressed and certify to the County at the end of construction that Interpace had performed its contract and had manufactured the pipe according to BC&E's drawn specifications. The principle way that the engineers would perform these duties was to carefully check the shop drawing submittals and design calculations submitted by Interpace,891 and observe pipe production and check the tests the engineers had specified the manufacturer was to give CH2M Hill for review and approval.892 Interpace was to "furnish evidence satisfactory to the engineer that materials and finished articles had passed the required tests prior to delivery". See Section 3-03(b) of Interpace Contract.

CH2M Hill was paid substantial sums for this service of 4.5% of the estimated construction costs or $292,211.16, plus an additional $72,728.11 of estimated construction costs, or a total of $364,939.27.893

The CH2M Hill engineer who designed the pipeline was Mr."Dink" Henderson.894 The head of the engineering services was theCH2M Hill project director, Mr. Jack Suddath.895 The Court has observed both witnesses called as adverse witnesses and judged their testimony and demeanor as a whole. Their actions in performing their contractual duties were at best superficial. They relied upon Interpace and its reputation to build proper pipe896 and breached CH2M Hill's contract obligation to, in good-faith, act as the County's representative to check on Interpace and make sure it was living up to its reputation.897 CH2M Hill represented that it had expert personnel who would do the engineering and monitoring.898 The Court finds the engineer who did the

pipeline design to be unqualified.899 The project engineer was also unqualified9 and admits to not being an expert in prestressed concrete pipe.901 The project manager signed and sealed the plans and specifications which makes him responsible for the entire engineering work in a field in which he had no specific personal expertise in violation of Section 471.025, Fla.Stat.902. Therefore, CH2M Hill materially breached its contract in not providing competent engineers in the specialty required to perform the necessary engineering functions involving a prestressed concrete pipeline.

The engineers overall failure to protect the County is directly responsible for 13 1/2 miles of defective pipeline being placed with public money into the heart of the Pinellas County water system. Had CH2M Hill done its job the defective pipeline would not have been manufactured and put into service.903 There are many specific charges of breach of contractual duties by Pinellas County against CH2M Hill which will be addressed by the Court.

(1) CH2M HILL BREACHED ITS CONTRACT IN FAILING TO SPECIFY THAT THE PIPELINE BE COLD TAR EPOXY COATED

It is the duty of a design engineer when designing a pipeline to determine if the pipeline should be coated.904 The pipeline was not required by specifications to be cold tar epoxy coated.905

The CH2M Hill design engineer who made the determination, based upon his stated qualifications, his demeanor, and his responses to questions on this subject and pipeline design in general, did not possess the proper expertise to make the decision as to whether to coat the pipe or not.906 He asked Price Brothers, a competitor of Interpace, whether to coat the pipe and they advised against coating.907 The engineer appears to have blindly followed Price Brothers' advice.

There is a conflict in the evidence and expert opinions

as to whether the pipeline should be coated.908 As trier of the fact, the Court chooses to believe the engineering opinion that the pipe should have been specified by CH2M Hill to be coated.909 The basis is that aggressive CO2 in the form of carbonic acid in a very aggressive and corrosive form is distributed along the pipeline.9 Laboratory tests of the groundwater along the pipelines which are the only groundwater tests offered into evidence, confirm this fact.910 If the groundwater condition was anything other than is what is shown in what appears to be a thorough and well done analysis then the Court assumes that the Defendants would have offered contrary laboratory tests. The weighing of the evidence requires giving great weight to objective groundwater tests done by disinterested qualified laboratory technicians.

The believably physical evidence that carbonation inside the mortar coating is taking place is in some of the pipe in the pipeline is persuasive.912 The Court has observed pictures of such carbonation in Interpace's petrographer's report, Exhibit D1-1370, photo #19, and the blowup version Exhibit 1558. The evidence offered on the pipe coating question by CH2M Hill913 is not believable based upon the weighing of the credibility of the witnesses and their engineering answers and expertise.914

Proper engineering procedure was not followed by CH2M Hill's engineer, Mr. Henderson, in determining the coating question. He looked at only soil borings from Price Brothers along selected portions of the line. Exhibit P-326. He incorrectly denies that water samples should also have been obtained.915 The Price Brothers' borings showed a pH in the soil of a lot of areas of 5.5 pH or less. In April of 1975, Mr. Henderson was specifically advised in writing by Interpace that any soil with a reading of 5.5 pH should receive two coats of black asphalt. See Exhibit 325.916 If you have a soil pH of around 4.5 or 5 you should coat the pipe.917 The Price Brothers report dictates that the pipe be coated if you do not have any other analysis.918

Therefore, Mr. Henderson's experience in evaluating the environment around the pipeline was simply inadequate. No water tests were done and the soil information at his disposal upon which he made the coating decision warranted coating the pipe. Mr. Henderson obviously ignored Interpace's engineering advice to coat the pipe received long before the Pinellas County pipe decision was made.919 Mr. Henderson also ignored soil information from borings from Florida Power and Harlan Laboratories acknowledged by him to have been received prior to the bid documents being sent out on the Pinellas County job.920 Total acidity is not the governing factor in determining whether to coat the pipe. 921

The Court finds that CH2M Hill breached its contract in failing to specify two coats of cold tar epoxy be placed on the Pinellas County pipe and, therefore, the County is entitled to damages for coating the new replacement pipe.

(2) CH2M HILL BEACEED ITS CONTRACT IN FAILING TO PROPERLY REVIEW INTERPACE 'S "SUBMITTAL SHEET" AND "EXPERIENCE LIST"

CH2M Hill was required to properly review and approve Interpace's submittal sheet and shop drawings, Exhibit P-5, under CH2M Hill's contract Section B(2) and Interpace's contract Section C-01.922 The submittals were received before Interpace started making the pipe.923 The submittal sheets were not properly reviewed by Mr. Henderson.924 Many errors in the submittals indicating the pipe was not going to be produced according to specifications and standards would have been apparent to an engineer skilled in reviewing submittals and shop drawings for prestress pipe.

(3) WRONGFUL APPROVAL OF CLASS WIRE

The Court has already made findings that "Interpace Class IV wire" was improperly developed, did not come within the standards of Section 2.8.1 of AWWA C301-72 or

ASTM A227-71 and was improperly manufactured.926 The Court has also held that even by approval of the engineer, Interpace was not relieved of liability for failing to manufacture the pipe according to specifications.927 The national standard and Pinellas County engineering contracts envisioed a service of checks and balances. There are provisions for engineers to check on the pipe manufacturer at each step of the manufacturing process.928 Review of the submittal sheets and shop drawings was the first check that Pinellas County engineers had on Interpace's intentions in manufacturing the pipe. CH2M Hill totally "dropped the ball" in this regard.

The submittal sheets show wire size to be governed by ASTM A227-71 and A648-73. Under "wire class" no standard is cited except the designation "IV" meaning Class IV wire. The County correctly claims that the reviewing engineer should have caught the fact that Class IV wire was not permitted under the specifications and standards.929 This task was one of the primary obligations of the engineer. The engineer should have looked at Section 2.8.1 of AWWA C301-72 and ASTM A227-71 and determined that Class IV wire was not permitted under the applicable standards.930 The same analysis made by the prior Court's findings in this regard931 should have been followed by CH2M Hill engineer Mr. Henderson's review. Mr. Henderson did not look up the standards at the time to determine if Class IV wire was permitted.932 He felt no obligation to investigate Class IV wire because of the submittal sheets absence of specifying a standard or reference to using Class IV wire.933 Mr. Henderson has no expertise in metallurgy934 and in fact there was no metallurgist on staff at CH2M Hill for him to have consulted.935

Mr. Henderson agrees that A648-73 is not in the specifications. He does not know why Interpace included the standard in the submittal sheet. He is not sure it concerned him at the time.936 He agrees Class IV wire is not permitted under A648-73.937 The specification ASTM A648-73 should

definitely have put Mr. Henderson on notice that something was wrong with the submittal sheet and the matter should have been thoroughly checked at that point.938

CH2M Hill breached its contract through the actions of Mr. Henderson. With a new class of wire and no standard cited for its use, he should not have ignored the stated intention of Interpace to use Class IV 8-gauge wire on all Pinellas County pipe. His review constituted no review at all of the most critical component part of a prestress pipe.939 CH2M Hill fell below the standard of care in approving Class IV wire without requiring the submission of tests, making inquiry of metallurgists, or reviewing prior tests Interpace performed as was their right under the Interpace contract.940 These findings constitute a major breach of the engineering contracts in permitting defective unsanctioned wire to be placed on the entire pipeline which now is so defective that the entire line must be replaced.

(4) FAILURE: TO CHECK INTERPACE "EXPERIENCE LIST"

The Interpace contract required Interpace to submit to the engineers an experience list of past similar jobs.941 The purpose of the list is to provide the enginer with a method of checking the past performance of the manufacturer.942 The standard of care at the time was to make inquiry otherwise there would be no reason for the request.943 The term used in the request of "similar design specifications" would include Class IV wire.944 The Detroit Water Board is on the list.9'5 The Detroit Water Board had rejected Class IV wire.946 Mr. Henderson of CH2M Hill did not check any jobs on the list.947 Had the list been checked to inquire about the use of Class IV wire, as it should have been, then CH2M Hill would have been put on notice that Class IV wire was at least suspect.948 CH2M Hill breached its contract in not checking the experience list for problems on similar jobs.949 Had such a check been made the problem with Class IV wire would have been uncovered. Again,

another check of the manufacturer was bypassed by CH2M Hill. CH2M Hill Engineer, Robert Ghiotto's, explanation that the experience list is simply to exclude bidders who are not qualified to make pipe is rejected.950

(5) FAILURE TO PROPERLY EXAMINE DESIGN FORMULAS AND EQUATIONS LEADING TO PRODUCTION OF DEFECTIVE AND UNDER PRESSURE RATED PIPE

The submittal sheets and shop drawings specified the initial and resultant modular ratio and creep factor together with the formulas for making each individual pipe.951 Review and approval of these submittals was again one of the primary responsibilities of the engineer.952

The substance of Mr. Henderson's testimony on this point is that he didn't either do or recheck any of the calculctions.953 The Court is satisfied from the overall tenure and testimony of Mr. Henderson that he did not check the calculations or the important modular ratio figures which vitally bear on the question of whether the pipe would be made at the working and transient pressures specified. Florida limestone (lime rock) is well known to be soft and porous.954 Mr. Henderson knew or should have known of these qualities and that the new plant at Lacoochee was using soft Florida aggregate.955 Mr. Henderson claims that a consulting engineer did not have to check the design calculations.956 The Court finds to the contrary. After listening to the testimony it is not clear what Mr. Henderson did check to protect Pinellas County from the problems visited on the County as the result of the defective manufacture of the pipeline. Mr. Henderson does not appear to be qualified to review a submittal sheet or the equations.957 Neither is Mr. Suddath who was the project manager and was supposed to review Mr. Henderson's work.958 These design formulas were found by CTL to be inadequate to produce pipe with soft Florida aggregate.959 Again, there was no check and balance. Because of CH2M Hill's breach of contract in failing to properly review the sub-

mittal sheet and shop drawings and calculations, and by CH2M Hill providing untrained personnel to review such submittals, Pinellas County now has a pipeline which does not have the pressure ratings specified and is made from sub-standard aggregate. Appendix A of AWWA C301-72 provides that "supporting data shall be provided if requested by the engineer". CH2M Hill could have and should have required supporting test data that the pipe were designed according to Appendix A and the cubic parabola. The information received would have been the same test information as developed bay CTL in testing Pinellas County pipe.960 It must be assumed that such tests would have shown the pipe defectiveness since all CTL tests failed the pressure-strain PO test.961 Here is yet another check and balance overlooked by the engineers if CH2M Hill was truly intending to comply with its contractual duty to protect the County.

(6) CH2M HILL BREACHED ITS CONTACT BY APPROVING USE OF 17—GAUGE STEEL INSTEAD OF .16— GAUGE STEEL

The submittal sheets calls for 17-gauge steel while 16-gauge steel should have been used.962 CH2M Hill should have reviewed the national standard and compared it to the submittal sheet and caught the error.963 The submittal should have been rejected.964 The breach of contract ordinarily would seem minor except for the finding of this Court already made965 that the number of prestressing wire wraps are dependent on the steel cylinder thickness used in design calculations.966 Interpace compounded this breach by, utilizing 16-gauge cylinders in manufacturing many of the pipes with the result that these pipes have an insufficient number of wire wraps per foot to compensate for the thicker 16-gauge cylinder. Thus, the pipes were designed assuming thinner cylinder steel than permitted by the specifications and, in addition, in pipes which were actually made using 16-gauge steel cylinders, were underwrapped or under reinfoced with pressure wire.967 The testimony of the engineering expert called by CH2M Hill on this question is rejected as cold rolled

steel instead of hot rolled steel was used.968

F. BREACH OF CONTRACT BY CH2M HILL FOR NOT INSPECTING THE MANUFACTURING PLANT AN AVERAGE OF FOUR (4) TIMES PER MONTH AND NOT ANALYZING, REVIEWING, APPROVING OR REQUIRING TO BE SUBMITTED TESTS OF INTERPACE COMPONENT PARTS

The Court has held that one of the contractual duties of CH2M Hill was to protect the County by monitoring the Lacoochee manufacturing plant and obtaining and reviewing the manufacturing tests.969 There remains for determination whether or not the engineer breached these duties.

(1) CH2M HILL BREACHED ITS CONTRACTUAL DUTY TO INSPECT THE PIPE MANUFACTURING PLANT

Pinellas County experts contend that the provision contained in paragraph B(1) of the CH2M Hill contract required the engineer to inspect the Lacoochee plant to make sure that Interpace was properly manufacturing the pipe according to specifications.970 CH2M Hill contends that the "construction site" meant the laying site. 971 While the Court has already made its ruling on this point, it is noted that if CH2M Hill's contention was correct it would be duplicative and redundant of the County's hiring of inspectors to inspect the laying of the pipe by the contractor Bumby & Stimpson. 972

The weight of the evidence shows that Pinellas County did not have the expertise to inspect the pipe at the laying site and hired an individual named Jim Fason to handle residential inspections.973 Mr. Fason was called by CH2M Hill and testified that his responsibilities in inspecting the pipe on behalf of Pinellas County were not to see to it that the pipe was made according to specifications974 but only to

determine any deficiencies that could be observed from the outside of the pipe such as mortar coating cracks, holes that needed patching, bell and spigot flange problems, etc.975 He became quite irate when on cross examination it was suggested you could tell from the outside of the pipe that the pipe had been manufactured according to specifications.976 He stated that only by viewing the manufacturing process could you tell if specifications had been met 977

The Court has heard from one of the inspectors who was at the laying site for the entire period of time the pipe was being installed978 and Mr. Fason979 ar[illegible] is satisfied that the greater weight of the evidence is that there were no superficial or other defects not properly addressed when the pipe was installed. Pinellas County is found to have had no notice that internally the pipe was grossly defective.

Factually, CH2M Hill cannot certify final acceptance, protect the County from defects, and judge the performance of Interpace in complying with Interpace's contract obligations without observing the pipe's manufacture at the Lacoochee plant.980 CH2M Hill admitted through the head of the Clearwat r office that at no time did CH2M Hill ever send anyone to Lacoochee to inspect the materials used or judge Interpace's performance under its contract or specifications-981 Interpace's chief engineer stated that it was not unusual for inspectors to be in plants in the 1970's.982

This controversy centered around the admitted fact that the project manager visited Lacoochee at least 3 to 4 times during the manufacture of Pinellas County's pipe.983 The County contended that if CH2M Hill was really correct in its position that it was to visit the laying site on an average of four (4) times per month, Mr. Suddath didn't do that either.984 The Court is faced with the requirement of determining who is telling the truth.

Mr. Suddath was pressed hard in his video deposition985 produced by Pinellas County and his live testimony

on cross examination986 about the purpose of his visits to Lacoochee if contractually CH2M Hill had no obligation to visit the plant. His answer to why he visited Lacoochee was that he was "curious".987 When asked what he had learned after the first visit his and was in essence "nothing".988 He admitted to having no expertise to determine whether the pipe was being manufactured properly.989 The evidence was that no one on CH2M Hill's staff had such expertise.990 Under such testimony it is obvious that whether at the laying site or at the plant, Mr. Suddath was not qualified to meet CH2M Hill's contractual duties to protect Pinellas County from defects and deficiencies in the work of Interpace. The testimony is therefore weighed and construed by the Court as tantamount to an admission that CH2M Hill did not comply with its inspection requirements agreed to in Section B(1) and B(4) of the CH2M Hill contract. The Court finds that Mr. Suddath was at the pipe plant going through the inspection motions without having the capacity for determining whether faulty manufacturing procedures were in progress. His testimony is unbelievable that he was there only out of "curiosity".

Pinellas County produced a Pinellas County inspector who testified that he did not see Mr. Suddath at the laying site of the actual pipeline through the period of one year and three months the pipe was being layed.992 Mr. Suddath would usually go to the County trailer kept some distance from the actual laying site.993 Mr. Suddath usually wore a suit or clothes not suitable for construction inspection.994 You need a four-wheel drive vehicle to go through the rugged terrain to the laying site.995 Mr. Suddath did not make such trips.996 Mr. Suddath would usually check at the trailer and then leave.997

CH2M Hill produced a witness not even on the witness list named Johnnie Jones who was the foreman for Bumby & Stimpson who was on the job throughout the laying of the pipeline. He was asked on direct examination if CH2M Hill engineers were at the laying site to which he

replied "several times".998 On cross examination he was asked what he meant by "many times" to which he replied "three".999 He then went on to say that CH2M Hill engineers were definitely not at the laying site an average of four (4) times per month. The engineers are bound by their own testimony which they have produced.

Based upon the demeanor of the witnesses and the greater weight of the evidence, the Court finds that the engineers were not monitoring the manufacturing plant as they should have been and were not at either the plant or the laying site an average of four (4) times per month in direct violation of the engineers' contract. CH2M Hill breached its obligation to inspect the pipe and protect the County from defects and deficiencies in the work of Interpace.

All sorts of obvious improper manufacturing techniques were going on at Lacoochee as previously found by the Court.1001 There was no quality control.1002 A majority of the defects found in the excavated pipe could have been detected by a properly trained engineer if CH2M Hill had sent one to the plant.1003

The majority of defects found upon strippinq could only have been found at the time the pipe was made.1004 In the eyes of the Court CH2M Hill is just as respsonsible as Interpace for a qrossly defective pipeline being placed into service.

(2) CH2M HILL BREACHED ITS CONTRACT BY NOT ADVISING PINELLAS COUNTY TO HAVE FULL-TIME OR PART-TIME INSPECTORS AT THE PIPE MANUFACTURING PLANT

Pinellas County has also sued CH2M Hill for failure to advise Pinellas County to provide full-time inspectors at Interpace's Lacoochee plant under Section A(1) of the Hills CH2M Hill's contract. CH2M Hill never advised that inspectors should be used.1005 Full-time inspectors would obvi-

ously have been able to catch substantially all of the numerous quality control and improper manufacturing procedures which took place when the pipeline was made.1006

With this charge CH2M Hill is caught in a dilemma. If the engineers duty was to visit the Lacoochee plant an average of four (4) times per month, a qualified engineer would have found the improper manufacturing procedures as found by this Court in these findings. If inspection was not a duty assumed under the contract then certainly Pinellas County should have been advised that full-time or part-time inspectors should be assigned to the manufacturing plant; Pinellas County has produced qualified engineering opinion to this effect and that in failing to give such advice CH2M Hill fell below the standard of care.1008 The Court concurs. CH2M Hill held itself out as the experts in such matters and were paid for their advice. Lacoochee-was known to the engineers to be a new plant.1009 The importance of this pipeline was also known to the engineers.1010 It was common to have inspectors at the plants in the 1970's.1011 In fact, a specific provision in the national standard required the manufacturer to be permit such inspections. See Section 1.7.1 of AWWA C301-72. The right of plant inspection was written into Interpace's contract by CH2M Hill. See paragraph 6, page C-3 of Interpace contract.

Based upon the greater weight of the evidence, the Court finds that CH2M Hill breached its contract with the County in failing to advise Pinellas County to have full and/or part time inspectors at the Lacoochee plant.

(3) CH2M HILL BREACHED ITS CONTRACT BY NOT REVIEWING MANUFACTURING TESTS OR REQUIRING THAT THE SPECIFIED TESTS BE SUBMITTED FOR REVIEW

The engineer specified that the manufacturer give the engineer certain tests under Section 1.9 of AWWA C301-72 before construction.1012 Again, this was a check on the com-

ponent parts provided as an option under the national standard. CH2M Hill never reviewed the tests nor did it insist on their production before the engineers permitted full scale production to commence.1013 Throughout the project the engineer knowing they had not reviewed the specified tests and knowing there was no expert monitoring of the manufacture of the pipe approved periodic payments to Interpace.1014 The engineer bypassed the last check and balance it had built into the specifications by certifying the job complete to Pinellas County and that the pipe had been made according to the plans and specifications1015 without first obtaining Interpace's affidavit that the pipe had been made according to its contract and specifications.1016 The Court does not understand how CH2M Hill could require the submittal of an affidavit and then certify the job complete according to the specifications knowing that the affidavit by the manufacturer certifying compliance with the specifications had not been submitted.

One of the options which could have been specified and written into the specifications was for Interpace to supply the fine and coarse aggregates from the Lacoochee plant under Section 2.4 of AWWA C301-72. Knowing that the plant was new, that Florida limestone was being used and was soft, CH2M Hill violated its contract to provide proper specifications by not specifying that Interpace comply with Section 2.4 of AWWA C301-72.

The Lacoochee aggregate had never met AWWA specifications since the plant opened.1017 This deficiency would have been found and a major portion of the defects stopped had the engineer taken advantage of this check and balance.1018 However, the Court has no reason to believe that, had the tests been specified, the conduct of the engineer in reviewing the results would have been any less deficient. But the allegation has been made and the Court must find that CH2M Hill breached its contract for failure to specify Section 2.4 tests under AWWA C301-72.

(4) CH2M HILL'S BELIEF THAT THE PIPELINE COULD NOT BE OPERATED AT THE SPECIFIED WORKING PRESSURE OF 150 PSI AND THAT THE LINE WOULD ONLY LAST 50 YEARS

Under CH2M Hill's contract the engineer was to provide a complete basis for design which includes specifying the proper operating and surge pressures in the line. See paragraph A(2) of the CH2M Hill contract. Mr. Henderson, when designing the pipeline, specified 150 psi operating pressure and 210 psi working plus surge (transcient) pressure. However, he testified that he only assumed that the line would operate at a minimum pressure of 40 psi and a maximum pressure of 100 psi.1019 He stated he only planned 10 years in advance when he designed the line consistent with a 10 Year Master Plan previously done for the County by CH2M Hill.1020 Mr. Henderson was emphatic that under no circumstance would he advise operating the line at greater pressures than 100 psi 1021 Mr. Suddath agreed with this conclusion.l° Mr. Henderson reasoned that he built in a safety margin on his own of 50 psi which, in effect, from his standpoint meant that Pinellas County could never safely operate at over 100 psi operating pressure.1023 In contradictory fashion, Mr. Henderson acknowledges that the specifications require the manufacturer to manufacture a pipe to withstand a design operating pressure of 150 psil024 and that working pressure under AWWA C301-72 means the maximum operating pressure at which the pipe is actually going to be operated.1025 He insists that he bound the manufacturer to produce a pipe of 150 psi working pressure.1026

Pinellas County has sued CH2M–Hill for breach of contract and negligence contending that CH2M Hill did not advise the County that the line could only be safely operated at 100 psi and that, therefore, CH2M Hill under designed the pipeline so that the line would not operate at the needed higher pressures as the County grew. Of course, if the working pressure wasn't designed correctly then the transient pressure wouldn't be adequate either. Mr. Henderson does

not remember ever advising the County of the 100 psi limitation.1027 Mr. Henderson does not remember ever advising the County of the 100 psi limitation.1027

Pick Talley., the Water Director at the time the pipeline was designed, said that at no time was he advised that the line can only be operated at a maximum of 100 psi working pressure in the future.1028 He understood the lines operating pressure would be 150 psi for needed growth and expansion in the future and he would not have agreed to such limitations.1029

In essence, the County claims that somehow CH2M Hill knew that in fact the County was not going to get a pressure rated pipe of 150 psi working pressure - 210 surge - as in fact the greater weight of the evidence shows from the CTL tests.1030

The County has produced expert testimony which is believed by the Court that if CH2M Hill was of the opinion that the pipe was undependable at pressures of 150 psi and could only be used at 100 psi, CH2M Hill breached its contract and fell below the acceptable engineering standards of care for pipeline design engineers.1031 Under these circumstances the water system demand would not be met.1032 In sum, CH2M Hill did not build sufficient flexibility into the pipeline under their secret design assumptions.1033 Mr. Henderson was impeached on the point with a letter written-by him in which pipeline meters were to be set at 150 psi and the statement made that occasionally pressures at between 120 and 140 psi could be expected.1034

Again, based upon judging the credibility of the witnesses CH2M Hill owed a duty to Pinellas County to Advise the County that pipe of 150 psi working pressure and 210 psi working plus surge (transient) pressure was specified, the County could only depend upon a maximum 100 psi working pressure and less than 210 working plus surge (transient) pressure. The County would have then had the option of

increasing working pressure and surge pressure specifications. The knowledge that CH2M Hill now states it had when the pipe was designed should have been used for the benefit of the County. Such knowledge would have required the engineer to check on the manufacturer to make sure that 1/3 of the working pressure was not being cut out of the pipe. Instead, the testimony is that CH2M Hill did nothing and by failing to take appropriate engineering action and advising its clients of the true facts, the engineer breached its contractual obligations to the County. Under Section A(1) as well as A(2) of the CH2M Hill contract, such advice and consultation was mandatory.

An additional charge by the County against CH2M Hill in the same vein is the claim that CH2M Hill believed the pipeline would only last 20 to 50 years when it designed the line and didn't advise the County of this fact, Mr. Henderson confirms that he expected the line to last 20 to 50 years.1035 He did not tell Pinellas County of his opinion.1036 The Water Director at the time recalled discussions with Henderson and Suddath and the Interpace salesman that the pipe had no finite life and could last 100 years or longer.1037 The prestressed concrete pipe people told him that concrete would get harder over time so there was no limit of the expected life of concrete pipe.1038 It could go on as long as 100 years, 200 years, or beyond "it may go on forever".1039 The Interpace salesman said that there was no known limit of the pipe's life and the pipe was expected to go on indefinitely.1040 The Court believes this testimony.

The then Water Director in conversation with Henderson was not told that the pipeline would last 50 years.1041 The Director would have gotten another type of pipe had he been so advised.1042 The Court also believes this testimony. It is consistent with the salesman's testimony1043 and Interpace's advertising.

The Court must find that CH2M Hill's admissions constitute admissions that it breached its contract with

Pinellas County.1045 It is not practical to put in such a strategic line and have it last only for 50 years.

G — IMPROPER DESIGN AND PLACEMENT OF VACCUUM RELIEF VALVES

CH2M Hill was to prepare proper basis for design of the pipeline under Section A(2);(3) of the CH2M Hill contract. Vacuum relief valves were designed to be spaced along the pipeline to prevent damage to the line by surge.1046 A vacuum relief valve has an air inlet with a float valve connected to the top of the pipe in the pipeline so that if a negative pressure (surge) wave comes by the valve, air will be released into the line disbursing the vacuum cavity behind the surge wave.1047 CH2M Hill designed the valves to be installed in vaults at ground level and some below ground level 1048 Inspection of the below ground level valves revealed that they were filled with water and 5 of 8 valves were under water.1049 The bottom of the vault contained only gravel, and groundwater came up through the bottom as well.1050 The valves had to be raised.1051 Pinellas County has sued CH2M Hill for the cost of raising the valves above water level and correcting the problem.

The Court has seen a picture of one of the valves (vaults) (Exhibit 1141). It was filled with putrid groundwater. If the valves were constructed as specified by CH2M Hill when a surge came by the valve, the valve would open and pour contaminated water into the public water supply line.1052 This would contaminate the water supply in the pipe. Also, since water would first be dumped into the line instead of air the surge would not be dissipated and the valve would not prevent the surge and potential damage to the pipe.1053 Therefore, CH2M Hill breached its contract with Pinellas County and fell below the standard of care in improperly designing and placing the vacuum relief valves.1054 Pinellas County is entitled to recover damages against CH2M Hill for repair and raising of the valves.